OVERVIEW OF THE PRIVACY ACT OF 1974

The "Overview of the Privacy Act of 1974" is a discussion of the Privacy Act's disclosure prohibition, its access and amendment provisions, and its agency recordkeeping requirements. Prepared by the Office of Information and Privacy in coordination with the Office of Management and Budget (OMB), it is updated and expanded each year. Any inquiry about the Privacy Act's provisions should be made to individual agency Privacy Act officers in conjunction with use of this "Overview." Particularly important Privacy Act policy/litigation questions, or questions concerning the OMB Guidelines, may be directed to Maya A. Bernstein, Policy Analyst, Office of Information and Regulatory Affairs, OMB, at (202) 395-3785.

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INTRODUCTION

The Privacy Act of 1974, 5 U.S.C. § 552a (1994) (amended 1996, 5 U.S.C.A. § 552a (West Supp. 1997)), which became effective on September 27, 1975, can generally be characterized as an omnibus "code of fair information practices" which attempts to regulate the collection, maintenance, use, and dissemination of personal information by federal government agencies. However, the Act's imprecise language, limited legislative history, and somewhat outdated regulatory guidelines have rendered it a difficult statute to decipher and apply. Moreover, even after twenty years of administrative and judicial analysis, numerous Privacy Act issues remain unresolved or unexplored. Adding to these interpretational difficulties is the fact that many of the most significant Privacy Act cases are unpublished district court decisions. A particular effort has been made in this "Overview" to clarify the existing state of Privacy Act law while at the same time highlighting those controversial, unsettled areas where further litigation and case law development can be expected.

LEGISLATIVE HISTORY

The entire legislative history of the Privacy Act is contained in a convenient, one-volume compilation. See House Comm. on Gov't Operations and Senate Comm. on Gov't Operations, 94th Cong., 2d Sess., Legislative History of the Privacy Act of 1974--S. 3418 (Public Law 93-579) Source Book on Privacy (1976) [hereinafter Source Book]. The Act was passed in great haste during the final week of the Ninety-Third Congress. No conference committee was convened to reconcile differences in the bills passed by the House and Senate. Instead, staffs of the respective committees--led by Senators Ervin and Percy, and Congressmen Moorhead and Erlenborn--prepared a final version of the bill that was ultimately enacted. The original reports are thus of limited utility in interpreting the final statute, while the more reliable legislative history consists of a brief analysis of the compromise amendments--entitled "Analysis of House and Senate Compromise Amendments to the Federal Privacy Act"--prepared by the staffs of the counterpart Senate and House committees and submitted in both the House and Senate in lieu of a conference report. See 120 Cong. Rec. 40,405-09, 40,881-83 (1974), reprinted in Source Book at 858-68, 987-94.

ROLE OF THE PRIVACY PROTECTION STUDY COMMISSION

Section 5 of the original Privacy Act established the "U.S. Privacy Protection Study Commission" to evaluate the statute and to issue a report containing recommendations for its improvement. The Commission issued its final report and ceased operation in 1977. See U.S. Privacy Protection Study Commis-

sion, Personal Privacy in an Information Society (1977) [hereinafter Privacy Commission Report].

ROLE OF THE OFFICE OF MANAGEMENT AND BUDGET

Subsection (v) of the Privacy Act requires the Office of Management and Budget (OMB) to: (1) prescribe guidelines and regulations for the use of federal agencies in implementing the Act, see 5 U.S.C. § 552a(v)(1); and (2) provide continuing assistance to and oversight of the implementation of the Act by agencies, see 5 U.S.C. § 552a(v)(2).

The vast majority of OMB's Privacy Act Guidelines [hereinafter OMB Guidelines] are published at 40 Fed. Reg. 28,948-78 (1975). However, these original guidelines have been supplemented in particular subject areas over the years. See 40 Fed. Reg. 56,741-43 (1975) (system of records definition, routine use and intra-agency disclosures, consent and congressional inquiries, accounting of disclosures, amendment appeals, rights of parents and legal guardians, relationship to Freedom of Information Act (FOIA)); 48 Fed. Reg. 15,556-60 (1983) (relationship to Debt Collection Act); 52 Fed. Reg. 12,990-93 (1987) ("call detail" programs); 54 Fed. Reg. 25818-29 (1989) (computer matching); 56 Fed. Reg. 18,599-601 (proposed Apr. 23, 1991) (computer matching); 61 Fed. Reg. 6428, 6435-39 (1996) ("Federal Agency Responsibilities for Maintaining Records About Individuals").

As a general rule, the OMB Guidelines are entitled to the deference usually accorded the interpretations of the agency that has been charged with the administration of a statute. See Quinn v. Stone, 978 F.2d 126, 133 (3d Cir. 1992); Baker v. Department of the Navy, 814 F.2d 1381, 1383 (9th Cir. 1987); Perry v. FBI, 759 F.2d 1271, 1276 n.7 (7th Cir. 1985) (citing Bartel v. FAA, 725 F.2d 1403, 1408 n.9 (D.C. Cir. 1984); Albright v. United States, 631 F.2d 915, 919 n.5 (D.C. Cir. 1980)), rev'd en banc on other grounds, 781 F.2d 1294 (7th Cir. 1986); Smiertka v. United States Dep't of the Treasury, 604 F.2d 698, 703 n.12 (D.C. Cir. 1979); Rogers v. United States Dep't of Labor, 607 F. Supp. 697, 700 n.2 (N.D. Cal. 1985); Sanchez v. United States, 3 Gov't Disclosure Serv. (P-H) ¶ 83,116, at 83,709 (S.D. Tex. Sept. 10, 1982); Golliher v. United States Postal Serv., 3 Gov't Disclosure Serv. (P-H) ¶ 83,114, at 83,703 (N.D. Ohio June 10, 1982); Greene v. VA, No. C-76-461-S, slip op. at 6-7 (M.D.N.C. July 3, 1978); Daniels v. FCC, No. 77-5011, slip op. at 8-9 (D.S.D. Mar. 15, 1978); see also Martin v. Office of Special Counsel, 819 F.2d 1181, 1188 (D.C. Cir. 1987) (OMB interpretation "worthy of our attention and solicitude"). However, a few courts have rejected particular aspects of the OMB Guidelines as inconsistent with the statute. See Kassel v. VA, No. 87-217-S, slip op. at 24-25 (D.N.H. Mar. 30, 1992) (subsection (e)(3)); Saunders v. Schweiker, 508 F. Supp. 305, 309 (W.D.N.Y. 1981) (same); Metadure Corp. v. United States, 490 F. Supp. 1368, 1373-74 (S.D.N.Y. 1980) (subsection (a)(2)); Florida Med. Ass'n v. HEW, 479 F. Supp. 1291, 1307-11 (M.D. Fla. 1979) (same); Zeller v. United States, 467 F. Supp. 487, 497-99 (E.D.N.Y. 1979) (same).

Questions concerning the Act should first be directed to agency Privacy Act officers. However, important policy/litigation questions, or questions concerning the OMB Guidelines, may be directed to Maya A. Bernstein, Policy Analyst, Office of Information and Regulatory Affairs, OMB, at (202) 395-3785.

COMPUTER MATCHING

The Computer Matching and Privacy Protection Act of 1988 (Pub. L. No. 100-503) amended the Privacy Act to add several new provisions. See 5 U.S.C. § 552a(a)(8)-(13), (e)(12), (o), (p), (q), (r), (u) (1994). These provisions add procedural requirements for agencies to follow when engaging in computer-matching activities; provide matching subjects with opportunities to receive notice and to refute adverse information before having a benefit denied or terminated; and require that agencies engaged in matching activities establish Data Protection Boards to oversee those activities. These provisions became effective on December 31, 1989. OMB's guidelines on computer matching should be consulted in this area. See 54 Fed. Reg. 25,818-29 (1989).

Subsequently, Congress enacted the Computer Matching and Privacy Protection Amendments of 1990 (Pub. L. No. 101-508), which further clarify the due process provisions found in subsection (p). OMB's proposed guidelines on these amendments appear at 56 Fed. Reg. 18,599-601 (proposed Apr. 23, 1991).

The highly complex and specialized provisions of the Computer Matching and Privacy Protection Act of 1988 and the Computer Matching and Privacy Protection Amendments of 1990 are not further addressed herein. For guidance on these provisions, agencies should consult the OMB Guidelines cited above.

POLICY OBJECTIVES

Broadly stated, the purpose of the Privacy Act is to balance the government's need to maintain information about individuals with the rights of individuals to be protected against unwarranted invasions of their privacy stemming from federal agencies' collection, maintenance, use, and disclosure of personal information about them. The historical context of the Act is important to an understanding of its remedial purposes: In 1974, Congress was concerned with curbing the illegal surveillance and investigation of individuals by federal agencies that had been exposed during the Watergate scandal; it was also concerned with potential abuses presented by the government's increasing use of computers to store and retrieve personal data by means of a universal identifier--such as an individual's social security number. The Act focuses on four basic policy objectives:

(1) To restrict disclosure of personally identifiable records maintained by agencies.

(2) To grant individuals increased rights of access to agency records maintained on themselves.

(3) To grant individuals the right to seek amendment of agency records maintained on themselves upon a showing that the records are not accurate, relevant, timely or complete.

(4) To establish a code of "fair information practices" which requires agencies to comply with statutory norms for collection, maintenance, and dissemination of records.

DEFINITIONS

PRIVACY ACT OVERVIEW

A. Agency

"any Executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the [federal] Government (including the Executive Office of the President), or any independent regulatory agency." 5 U.S.C. § 552a(1) (incorporating 5 U.S.C. § 552(f) (1994), as amended by Electronic Freedom of Information Act Amendments of 1996, 5 U.S.C.A. § 552 (West Supp. 1997), which in turn incorporates 5 U.S.C. § 551(1) (1994)).

comment -- The Privacy Act--like the Freedom of Information Act, 5 U.S.C. § 552--applies only to a federal "agency." See OMB Guidelines, 40 Fed. Reg. 28,948, 28,950-51 (1975); 120 Cong. Rec. 40,408 (1974), reprinted in Source Book at 866; see also, e.g., NLRB v. United States Postal Serv., 841 F.2d 141, 144 n.3 (6th Cir. 1988) (Postal Service is an "agency" because it is an "independent establishment of the executive branch"); Ehm v. National R.R. Passenger Corp., 732 F.2d 1250, 1252-55 (5th Cir. 1984) (Amtrak held not to constitute a "Government-controlled corporation"); Dong v. Smithsonian Inst., 878 F. Supp. 244 (D.D.C. 1995) (finding that Smithsonian Institution constitutes an "agency" subject to Privacy Act) (appeal pending). But cf. Alexander v. FBI, No. 96-2123, 1997 WL 428532, at **2-4 (D.D.C. June 12, 1997) (although recognizing that definition of "agency" under Privacy Act is same as in FOIA and that courts have interpreted that definition under FOIA to exclude President's immediate personal staff and units within Executive Office of President whose sole function is to advise and assist President, nevertheless rejecting such limitation with regard to "agency" as used in Privacy Act due to different purposes that two statutes serve) (interlocutory appeal pending); Shannon v. General Elec. Co., 812 F. Supp. 308, 313, 315 n.5 (N.D.N.Y. 1993) ("no dispute" that GE falls within definition of "agency" subject to requirements of Privacy Act where pursuant to contract it operated Department of Energy-owned lab under supervision, control, and oversight of Department and where by terms of contract GE agreed to comply with Privacy Act).

Thus, state and local government agencies are not covered by the Privacy Act, see Ortez v. Washington County, Or., 88 F.3d 804, 811 (9th Cir. 1996); Brown v. Kelly, No. 93-5222, slip op. at 1 (D.C. Cir. Jan. 27, 1994) (per curiam); Monk v. Teeter, No. 89-16333, slip op. at 4 (9th Cir. Jan. 8, 1991); Davidson v. Georgia, 622 F.2d 895, 896 (5th Cir. 1980); Ferguson v. Alabama Criminal Justice Info. Ctr., 962 F. Supp. 1446, 1446-47 (M.D. Ala. 1997); Williams v. District of Columbia, No. 95CV0936, 1996 WL 422328, at **2-3 (D.D.C. July 19, 1996); Martin-

son v. Violent Drug Traffickers Project, No. 95-2161, 1996 WL 411590, at **1-2 (D.D.C. July 11, 1996), summary affirmance granted, No. 96-5262 (D.C. Cir. Sept. 22, 1997); Mamarella v. County of Westchester, 898 F. Supp. 236, 237-38 (S.D.N.Y. 1995); Reno v. United States, No. 4:94CV243, 1995 U.S. Dist. LEXIS 12834, at *6 (W.D.N.C. Aug. 14, 1995) (state national guard); Connolly v. Beckett, 863 F. Supp. 1379, 1383-84 (D. Colo. 1994); MR by RR v. Lincolnwood Bd. of Educ., Dist. 74, 843 F. Supp. 1236, 1239-40 (N.D. Ill. 1994), aff'd sub nom. Rheinstrom v. Lincolnwood Bd. of Educ., Dist. 74, No. 94-1357, 1995 U.S. App. LEXIS 10781 (7th Cir. May 10, 1995); Malewich v. United States Postal Serv., No. 91-4871, slip op. at 19 (D.N.J. Apr. 8, 1993), aff'd, 27 F.3d 557 (3d Cir. 1994) (unpublished table decision); Shields v. Shetler, 682 F. Supp. 1172, 1176 (D. Colo. 1988); Ryans v. New Jersey Comm'n, 542 F. Supp. 841, 852 (D.N.J. 1982), nor does federal funding or regulation convert such entities into covered agencies, see St. Michaels Convalescent Hosp. v. California, 643 F.2d 1369, 1373 (9th Cir. 1981); Adelman v. Discover Card Servs., 915 F. Supp. 1163, 1166 (D. Utah 1996).

Similarly, private entities are not subject to the Act, see Mitchell v. G.E. American Spacenet, No. 96-2624, 1997 WL 226369, at *1 (4th Cir. May 7, 1997); Gilbreath v. Guadalupe Hosp. Found., 5 F.3d 785, 791 (5th Cir. 1993); Davis v. Boston Edison Co., No. 83-1114-2 (D. Mass. Jan. 21, 1985); Friedlander v. United States Postal Serv., No. 84-773, slip op. at 5-6 (D.D.C. Oct. 16, 1984); Marshall v. Park Place Hosp., 3 Gov't Disclosure Serv. (P-H) ¶ 83,088, at 83,057 (D.D.C. Feb. 25, 1983); see also Bybee v. Pirtle, No. 96-5077, 1996 WL 596458, at *1 (6th Cir. Oct. 16, 1996) (appellant did not state claim under Privacy Act because Act does not apply to conduct of individuals who refused to hire him due to his failure to furnish his social security number or fill out W-4 forms for income tax purposes); Steadman v. Rocky Mountain News, No. 95-1102, 1995 U.S. App. LEXIS 34986, at *4 (10th Cir. Dec. 11, 1995) (Privacy Act claims "cannot be brought against defendant because defendant is not a governmental entity"); United States v. Mercado, No. 94-3976, 1995 U.S. App. LEXIS 2054, at **3-4 (6th Cir. Jan. 31, 1995) (appellant's retained defense counsel not an "agency"), nor does federal funding or regulation render such entities subject to the Act, see Unt v. Aerospace Corp., 765 F.2d 1440, 1448 (9th Cir. 1985); United States v. Haynes, 620 F. Supp. 474, 478-79 (M.D. Tenn. 1985); Dennie v. University of Pittsburgh Sch. of Med., 589 F. Supp. 348, 351-52 (D.V.I. 1984), aff'd, 770 F.2d 1068 (3d Cir. 1985) (unpublished table decision); see also United States v. Miller, 643 F.2d 713, 715 n.1 (10th Cir. 1981)

(finding that definition of "agency" does not encompass national banks); Boggs v. Southeastern Tidewater Opportunity Project, No. 2:96cv196, 1996 U.S. Dist. LEXIS 6977, at **5-9 (E.D. Va. May 22, 1996) (rejecting plaintiff's argument concerning entity's acceptance of federal funds and stating that "[i]t is well settled that the Administrative Procedures [sic] Act, 5 U.S.C. § 551 . . . applies only to Federal agencies").

Note also that federal entities outside of the executive branch, such as a grand jury, see Standley v. Department of Justice, 835 F.2d 216, 218 (9th Cir. 1987), a probation office, see Schwartz v. United States Dep't of Justice, No. 95-6423, 1996 WL 335757, at *1 (2d Cir. June 6, 1996), aff'g No. 94 CIV. 7476, 1995 WL 675462, at *7 (S.D.N.Y. Nov. 14, 1995); Chambers v. Division of Probation, No. 87-0163, slip op. at 2 (D.D.C. Apr. 8, 1987), or a federal bankruptcy court, see In re Adair, No. 97-67820, 1997 Bankr. LEXIS 1362, at **3-4 (Bankr. N.D. Ga. Aug. 25, 1997), are not subject to the Act.

An exception to this rule, however, is the social security number usage restrictions, contained in Section 7 of the Privacy Act, which do apply to federal, state, and local government agencies. (Section 7, originally part of the Privacy Act, Public Law 93-579, was not codified; it can be found at 5 U.S.C. § 552a note (Disclosure of Social Security Number)). This special provision is discussed below under "Social Security Number Usage."

A Privacy Act lawsuit is properly filed against an "agency" only, not against an individual, a government official, or an employee. See, e.g., Connelly v. Comptroller of the Currency, 876 F.2d 1209, 1215 (5th Cir. 1989); Petrus v. Bowen, 833 F.2d 581, 582-83 (5th Cir. 1987); Schowengerdt v. General Dynamics Corp., 823 F.2d 1328, 1340 (9th Cir. 1987); Hewitt v. Grabicki, 794 F.2d 1373, 1377 & n.2 (9th Cir. 1986); Unt, 765 F.2d at 1447; Brown-Bey v. United States, 720 F.2d 467, 469 (7th Cir. 1983); Windsor v. The Tennessean, 719 F.2d 155, 159-60 (6th Cir. 1983); Bruce v. United States, 621 F.2d 914, 916 n.2 (8th Cir. 1980); Parks v. IRS, 618 F.2d 677, 684 (10th Cir. 1980); Claasen v. Brown, No. 94-1018, 1996 WL 79490, at **3-4 (D.D.C. Feb. 16, 1996); Lloyd v. Coady, No. 94-5842, 1995 U.S. Dist. LEXIS 2490, at **3-4 (E.D. Pa. Feb. 28, 1995), upon consideration of amended complaint, 1995 U.S. Dist. LEXIS 6258, at *3 n.2 (E.D. Pa. May 9, 1995); Hill v. Blevins, No. 3-CV-92-0859, slip op. at 4-5 (M.D. Pa. Apr. 12, 1993), aff'd, 19 F.3d 643 (3d Cir. 1994) (unpublished table decision); Malewich, No. 91-4871, slip op. at 19 (D.N.J. Apr. 8, 1993); Sheptin v. United States Dep't of Justice, No. 91-2806, slip op. at 5-6 (D.D.C. Apr. 30, 1992); Williams v. McCausland,

791 F. Supp. 992, 1000 (S.D.N.Y. 1992); Mittleman v. United States Treasury, 773 F. Supp. 442, 450 (D.D.C. 1991); Stephens v. TVA, 754 F. Supp. 579, 580 n.1 (E.D. Tenn. 1990); B.J.R.L. v. Utah, 655 F. Supp. 692, 696-97 (D. Utah 1987); Dennie, 589 F. Supp. at 351-53; Gonzalez v. Leonard, 497 F. Supp. 1058, 1075-76 (D. Conn. 1980). Note, however, that a prosecution enforcing the Privacy Act's criminal penalties provision, 5 U.S.C. § 552a(i) (see "Criminal Penalties" discussion below), would of course properly be filed against an individual. See Stone v. Defense Investigative Serv., 816 F. Supp. 782, 785 (D.D.C. 1993) ("Under the Privacy Act, this Court has jurisdiction over individually named defendants only for unauthorized disclosure in violation of 5 U.S.C. § 552a(i)."); see also Hampton v. FBI, No. 93-0816, slip op. at 8, 10-11 (D.D.C. June 30, 1995) (citing Stone).

However, some courts have held that the head of an agency, if sued in his or her official capacity, can be a proper party defendant. See, e.g., Hampton, No. 93-0816, slip op. at 8, 10-11 (D.D.C. June 30, 1995); Jarrell v. Tisch, 656 F. Supp. 237, 238 (D.D.C. 1987); Diamond v. FBI, 532 F. Supp. 216, 219-20 (S.D.N.Y. 1981), aff'd, 707 F.2d 75 (2d Cir. 1983); Nemetz v. Department of the Treasury, 446 F. Supp. 102, 106 (N.D. Ill. 1978); Rowe v. Tennessee, 431 F. Supp. 1257, 1264 (M.D. Tenn. 1977), vacated on other grounds, 609 F.2d 259 (6th Cir. 1979). Further, leave to amend a complaint to substitute a proper party defendant ordinarily is freely granted where the agency is on notice of the claim. See, e.g., Reyes v. Supervisor of DEA, 834 F.2d 1093, 1097 (1st Cir. 1987); Petrus, 833 F.2d at 583.

B. Individual

"a citizen of the United States or an alien lawfully admitted for permanent residence." 5 U.S.C. § 552a(a)(2).

comment -- Compare this definition with the FOIA's much broader "any person" definition (5 U.S.C. § 552(a)(3) (1994)). See, e.g., Fares v. INS, No. 94-1339, 1995 WL 115809, at *4 (4th Cir. 1995) (per curiam) ("[Privacy] Act only protects citizens of the United States or aliens lawfully admitted for permanent residence."); Raven v. Panama Canal Co., 583 F.2d 169, 170-71 (5th Cir. 1978) (same as Fares, and comparing "use of the word `individual' in the Privacy Act, as opposed to the word `person,' as more broadly used in the FOIA"); Cudzich v. INS, 886 F. Supp. 101, 105 (D.D.C. 1995) (A plaintiff whose permanent resident status had been revoked "is not an `individual' for the purposes of the Privacy Act. . . . Plaintiff's only potential access to

the requested information is therefore under the Freedom of Information Act.").

Deceased individuals do not have any Privacy Act rights, nor do executors or next-of-kin. See OMB Guidelines, 40 Fed. Reg. 28,948, 28,951 (1975); see also Monk v. Teeter, No. 89-16333, slip op. at 4 (9th Cir. Jan. 8. 1991); Crumpton v. United States, 843 F. Supp. 751, 756 (D.D.C. 1994), aff'd on other grounds sub nom. Crumpton v. Stone, 59 F.3d 1400 (D.C. Cir. 1995), cert. denied, 116 S. Ct. 1018 (1996).

Corporations and organizations also do not have any Privacy Act rights. See St. Michaels Convalescent Hosp. v. California, 643 F.2d 1369, 1373 (9th Cir. 1981); OKC v. Williams, 614 F.2d 58, 60 (5th Cir. 1980); Dresser Indus. v. United States, 596 F.2d 1231, 1237-38 (5th Cir. 1980); Cell Assocs. v. NIH, 579 F.2d 1155, 1157 (9th Cir. 1978); Stone v. Export-Import Bank of the United States, 552 F.2d 132, 137 n.7 (5th Cir. 1977); Committee in Solidarity v. Sessions, 738 F. Supp. 544, 547 (D.D.C. 1990), aff'd on other grounds, 929 F.2d 742 (D.C. Cir. 1991); United States v. Haynes, 620 F. Supp. 474, 478-79 (M.D. Tenn. 1985); Utah-Ohio Gas & Oil, Inc. v. SEC, 1 Gov't Disclosure Serv. (P-H) ¶ 80,038, at 80,114 (D. Utah Jan. 9, 1980); see also OMB Guidelines, 40 Fed. Reg. at 28,951.

The OMB Guidelines suggest that an individual has no standing under the Act to challenge agency handling of records that pertain to him solely in his "entrepreneurial" capacity. OMB Guidelines, 40 Fed. Reg. at 28,951 (quoting legislative history and stating that it "suggests that a distinction can be made between individuals acting in a personal capacity and individuals acting in an entrepreneurial capacity (e.g., as sole proprietors) and that th[e] definition [of `individual'] (and, therefore, the Act) was intended to embrace only the former"). However, there is a split of authority concerning OMB's personal/entrepreneurial distinction as applied to an individual. Compare Shermco Indus. v. Secretary of the United States Air Force, 452 F. Supp. 306, 314-15 (N.D. Tex. 1978) (accepting distinction), rev'd & remanded on other grounds, 613 F.2d 1314 (5th Cir. 1980), and Daniels v. FCC, No. 77-5011, slip op. at 8-9 (D.S.D. Mar. 15, 1978) (same), with Henke v. Department of Commerce, No. 94-189, slip op. at 5-6 (D.D.C. May 26, 1995) (rejecting distinction), vacated & remanded on other grounds, 83 F.3d 1453 (D.C. Cir. 1996); Henke v. United States Dep't of Commerce, No. 94-0189, 1996 WL 692020, at **2-3 (D.D.C. Aug. 19, 1994) (same), aff'd on other grounds, 83 F.3d 1445 (D.C. Cir. 1996); Metadure Corp. v. United States, 490 F. Supp. 1368, 1373-74 (S.D.N.Y. 1980) (same); Florida Med. Ass'n v.

HEW, 479 F. Supp. 1291, 1307-11 (M.D. Fla. 1979) (same), and Zeller v. United States, 467 F. Supp. 487, 496-99 (E.D.N.Y. 1979) (same). Cf. St. Michaels Convalescent Hosp., 643 F.2d at 1373 (stating that "sole proprietorships[] are not `individuals' and thus lack standing to raise a claim under the Privacy Act").

Privacy Act rights are personal to the individual who is the subject of the record and cannot be asserted derivatively by others. See, e.g., Parks v. IRS, 618 F.2d 677, 684-85 (10th Cir. 1980) (union lacks standing to sue for damages to its members); Word v. United States, 604 F.2d 1127, 1129 (8th Cir. 1979) (criminal defendant lacks standing to allege Privacy Act violations regarding use at trial of medical records concerning third party); Dresser Indus., 596 F.2d at 1238 (company lacks standing to litigate employees' Privacy Act claims); Shulman v. Secretary of HHS, No. 94 CIV. 5506, 1997 WL 68554, at **1, 3 (S.D.N.Y. Feb. 19, 1997) (plaintiff had no standing to assert any right that might have belonged to former spouse), aff'd, No. 96-6140 (2d Cir. Sept. 3, 1997); Harbolt v. United States Dep't of Justice, No. A-84-CA-280, slip op. at 2 (W.D. Tex. Apr. 29, 1985) (prisoner lacks standing to assert Privacy Act claims of other inmates regarding disclosure of their records to him); Abramsky v. United States Consumer Prod. Safety Comm'n, 478 F. Supp. 1040, 1041-42 (S.D.N.Y. 1979) (union president cannot compel release of records pertaining to employee's termination); Attorney Gen. of the United States v. Irish N. Aid Comm., No. 77-700, slip op. at 6-7 (S.D.N.Y. Oct. 7, 1977) (committee lacks standing to sue in representative capacity). But see National Fed'n of Fed. Employees v. Greenberg, 789 F. Supp. 430, 433 (D.D.C. 1992) (union has associational standing because members whose interests union seeks to represent would themselves have standing), vacated & remanded on other grounds, 983 F.2d 286 (D.C. Cir. 1993).

Note, however, that the parent of any minor, or the legal guardian of an incompetent, may act on behalf of that individual. See 5 U.S.C. § 552a(h); see also Gula v. Meese, 699 F. Supp. 956, 961 (D.D.C. 1988). The OMB Guidelines note that subsection (h) is "discretionary and that individuals who are minors are authorized to exercise the rights given to them by the Privacy Act or, in the alternative, their parents or those acting in loco parentis may exercise them in their behalf." OMB Guidelines, 40 Fed. Reg. at 28,970; see also OMB Guidelines, 40 Fed. Reg. 56,741, 56,742 (1975) (noting that "[t]here is no absolute right of a parent to have access to a record about a child absent a court order or consent").

C. Maintain

"maintain, collect, use or disseminate." 5 U.S.C. § 552a(a)(3).

comment -- This definition embraces various activities with respect to records and has a meaning much broader than the common usage of the term. See OMB Guidelines, 40 Fed. Reg. 28,948, 28,951 (1975); see also, e.g., Albright v. United States, 631 F.2d 915, 918-20 (D.C. Cir. 1980) (analyzing scope of "maintain" in context of subsection (e)(7) challenge to record describing First Amendment-protected activity).

D. Record

"any item, collection, or grouping of information about an individual that is maintained by an agency, including, but not limited to, his education, financial transactions, medical history, and criminal or employment history and that contains his name, or the identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print or a photograph." 5 U.S.C. § 552a(a)(4).

comment -- To qualify as a "record," the information must identify an individual. Compare Reuber v. United States, 829 F.2d 133, 142 (D.C. Cir. 1987) (letter reprimanding individual sent to and disclosed by agency was "record" because it clearly identified individual by name and address), with Robinson v. United States Dep't of Educ., No. 87-2554, slip op. at 7-8 (E.D. Pa. Jan. 20, 1988) (letter describing individual's administrative complaint not "record" because it did not mention his name).

The OMB Guidelines state that the term "record" means "any item of information about an individual that includes an individual identifier," OMB Guidelines, 40 Fed. Reg. 28,948, 28,951 (1975), and "`can include as little as one descriptive item about an individual,'" id. at 28,952 (quoting legislative history appearing at 120 Cong. Rec. 40,408, 40,883 (1974), reprinted in Source Book at 866, 993). Consistent with the OMB Guidelines, the Court of Appeals for the Third Circuit held that the term "record" "encompass[es] any information about an individual that is linked to that individual through an identifying particular" and is not "limited to information which taken alone directly reflects a characteristic or quality." Quinn v. Stone, 978 F.2d 126, 133 (3d Cir. 1992) (out-of-date home address on roster and time card information held to be records covered by Privacy Act); see also Williams v. VA, 104 F.3d 670, 673-74 (4th Cir. 1997) (quoting legislative history and finding that materials qualified as "records" because they "substantially pertain to Appellant," "contain `information about' [him], as well as his `name' or `identifying number,'" and "do more than merely apply to him"); Henke v. United States Dep't of Commerce, No. 94-0189, 1996 WL 692020, at

*3 (D.D.C. Aug. 19, 1994) (names of four reviewers who evaluated grant applicant's proposal are applicant's "records" under Privacy Act), aff'd on other grounds, 83 F.3d 1445 (D.C. Cir. 1996); cf. Sullivan v. United States Postal Serv., 944 F. Supp. 191, 196 (W.D.N.Y. 1996) (finding that disclosure to job applicant's employer that applicant had applied for employment with Postal Service constituted disclosure of "record" under the Privacy Act; although no other information was disclosed from application, rejecting Postal Service's attempt to distinguish between disclosing fact of record's existence and disclosing information contained in record, as applicant's name was part of information contained in application and Postal Service disclosed that particular applicant by that name had applied for employment).

Nevertheless, several courts have limited Privacy Act coverage by adopting a narrow construction of the term "record." See, e.g., Tobey v. NLRB, 40 F.3d 469, 471-73 (D.C. Cir. 1994) ("fact that information contains an individual's name does not mean that the information is `about' the individual"; Privacy Act protects "only information that actually describes the individual in some way"; that "NLRB employees could use data from [computer system] in combination with other information to draw inferences about [plaintiff's] job performance, as [NLRB Regional Director] apparently did . . . does not transform the [computer system] files into records"), aff'g 807 F. Supp. 798, 801 (D.D.C. 1992) (information about NLRB employee retrieved from NLRB computer system that was created to track and monitor NLRB unfair labor practice and representation cases was not "record" because information was not "personal" information about employee and did not contain evaluations of job performance, even if information might be useful to supervisors in reviewing employee's work); Unt v. Aerospace Corp., 765 F.2d 1440, 1448-49 (9th Cir. 1985) (letter written by employee--containing allegations of mismanagement against corporation that led to his dismissal--not his "record" because it was "about" the corporation and reflected "only indirectly on any quality or characteristic" of employee); Fisher v. NIH, 934 F. Supp. 464, 466-67, 469-72 (D.D.C. 1996) (following Tobey and finding that information in database about articles published in scientific journals that contained bibliographic information including title of article and publication, name and address of author, and summary of article and also included annotation "[scientific misconduct--data to be reanalyzed]," provides "information `about' the article described in each file and does not provide information `about' [the author]," even though information "could be used to draw inferences or conclusions about [the author]"), summary affirmance granted, No. 96-5252 (D.C. Cir. Nov. 27, 1996); Bechhoefer v. United States Dep't of Justice, 934 F. Supp. 535, 538-39 (W.D.N.Y. 1996)

(following reasoning of Unt and Tobey and concluding that letter concerning alleged drug dealers was not record "about" author of letter; "If the letter was `about' anyone, it was about the people that plaintiff accused of criminal activities, not about himself."); Wolde-Giorgis v. United States, No. 94-254, slip op. at 5-6 (D. Ariz. Dec. 9, 1994) (citing Unt with approval and holding that Postal Service claim form and information concerning estimated value of item sent through mail "not a `record' within the meaning of the [Privacy Act]" because it "disclosed no information about the plaintiff" and did not reflect any "`quality or characteristic' concerning the plaintiff"), aff'd, 65 F.3d 177 (9th Cir. 1995) (unpublished table decision); Ingerman v. IRS, No. 89-5396, slip op. at 6 (D.N.J. Apr. 3, 1991) ("An individual's social security number does not contain his name, identifying number or other identifying particular. . . . [A] social security number is the individual's identifying number, and therefore, it cannot qualify as a record under . . . the Privacy Act."), aff'd, 953 F.2d 1380 (3d Cir. 1992) (unpublished table decision); Nolan v. United States Dep't of Justice, No. 89-A-2035, slip op. at 16 (D. Colo. Mar. 18, 1991) (names of FBI agents and other personnel held not requester's "record" and therefore "outside the scope of the [Privacy Act]"), aff'd, 973 F.2d 843 (10th Cir. 1992); Doe v. United States Dep't of Justice, 790 F. Supp. 17, 22 (D.D.C. 1992) (applying Nolan and alternatively holding that "names of agents involved in the investigation are properly protected from disclosure"); Shewchun v. United States Customs Serv., No. 87-2967, slip op. at 3 (D.D.C. Jan. 11, 1989) (letter concerning agency's disposition of plaintiff's merchandise "lacks a sufficient informational nexus with [plaintiff] (himself, as opposed to his property) to bring it within the definition of `record'"); Blair v. United States Forest Serv., No. A85-039, slip op. at 4-5 (D. Alaska Sept. 24, 1985) ("Plan of Operation" form completed by plaintiff not his "record" as it "reveals nothing about his personal affairs"), appeal dismissed, No. 85-4220 (9th Cir. Apr. 1, 1986); Windsor v. A Fed. Executive Agency, 614 F. Supp. 1255, 1260-61 (M.D. Tenn. 1983) (record includes only sensitive information about individual's private affairs), aff'd, 767 F.2d 923 (6th Cir. 1985) (unpublished table decision); Cohen v. United States Dep't of Labor, 3 Gov't Disclosure Serv. (P-H) ¶ 83,157, at 83,791 (D. Mass. Mar. 21, 1983) (record includes only "personal" information); Houston v. United States Dep't of the Treasury, 494 F. Supp. 24, 28 (D.D.C. 1979) (same); American Fed'n of Gov't Employees v. NASA, 482 F. Supp. 281, 282-83 (S.D. Tex. 1980) (sign-in/sign-out sheet not "record" because, standing alone, it did not reveal any "substantive information about the employees"); see also Benson v. United States, No. 80-15-MC, slip op. at 4 (D. Mass. June 12, 1980) (permitting withholding of OPM investigator's name

where identities of informants were properly excised under subsection (k)(5)).

The Ninth Circuit Court of Appeals' narrow construction of the term "record" in Unt elicited a particularly forceful dissent by Judge Ferguson. 765 F.2d at 1449-52. However, Unt was cited with approval in Topuridze v. FBI, No. 86-3120, slip op. at 3-4 (D.D.C. Feb. 6, 1989), reconsideration denied sub nom. Topuridze v. USIA, 772 F. Supp. 662 (D.D.C. 1991), in which the court held that a letter written about the requester, authored by a third party, cannot be regarded as the third party's record. The court in Topuridze ruled that it "does not follow that a document reveals some quality or characteristic of an individual simply by virtue of the individual having authored the document." Topuridze v. FBI, No. 86-3120, slip op. at 3-4 (D.D.C. Feb. 6, 1989). Subsequently, on reconsideration and after in camera review, although the court reaffirmed that "[i]n order to be about an individual a record must `reflect some quality or characteristic of the individual involved,'" 772 F. Supp. at 664 (quoting Boyd v. Secretary of the Navy, 709 F.2d 684, 686 (11th Cir. 1983) (per curiam)), the court stated that the document "may well be `about' the author," as it discussed the author's family status, employment, and fear of physical retaliation if the letter were disclosed to plaintiff. Topuridze v. USIA, 772 F. Supp. at 665 & n.6. However, the court ultimately ruled that it need not reach the issue of whether or not the letter was "about" the author and it denied reconsideration on the ground that the letter was without dispute about the subject/plaintiff and therefore must be released to him. Id. at 665.

Recently, however, the Court of Appeals for the District of Columbia Circuit "observe[d] that the definitions of `record' offered by other circuits appear either too broad or too narrow." Tobey, 40 F.3d at 472. Examining the Third Circuit's statement in Quinn that information could qualify as a record "`if that piece of information were linked with an identifying particular (or was itself an identifying particular),'" the D.C. Circuit rejected the Third Circuit's interpretation "[t]o the extent that . . . [it] fails to require that information both be `about' an individual and be linked to that individual by an identifying particular." Id. In order to qualify as a "record," the D.C. Circuit ruled that the information "must both be `about' an individual and include his name or other identifying particular." Id. at 471. On the other hand, the D.C. Circuit rejected "as too narrow the Ninth and Eleventh Circuits' definitions" in Unt and Boyd, and stated that: "So long as the information is `about' an individual, nothing in the Act requires that it additionally be about a `quality or characteristic' of the individual." Tobey, 40 F.3d at 472. Ultimately, the

D.C. Circuit, "[w]ithout attempting to define `record' more specifically than [necessary] to resolve the case at bar," held that an NLRB computer system for tracking and monitoring cases did not constitute a system of records, because its files contained no information "about" individuals, despite the fact that the case information contained the initials or identifying number of the field examiner assigned to the case. Id. at 471-73. Although the court recognized that the case information could be, and apparently was, used in connection with other information to draw inferences about a field examiner's job performance, it stated that that "does not transform the [computer system] files into records about field examiners." Id. at 472-73. See also Fisher, 934 F. Supp. at 466-67, 469-72 (following Tobey and finding that information in database about articles published in scientific journals that contained bibliographic information including title of article and publication, name and address of author, and summary of article and also included annotation "[scientific misconduct--data to be reanalyzed]," provides "information `about' the article described in each file and does not provide information `about' [the author]," even though information "could be used to draw inferences or conclusions about [the author]"; "The fact that it is possible for a reasonable person to interpret information as describing an individual does not mean the information is about that individual for purposes of the Privacy Act.")

For a further illustration of conflicting views concerning the meaning of the term "record" in the subsection (d)(1) access context, compare Voelker v. IRS, 646 F.2d 332, 334 (8th Cir. 1981), with Nolan v. United States Dep't of Justice, No. 89-A-2035, slip op. at 16 (D. Colo. Mar. 18, 1991), aff'd, 973 F.2d 843 (10th Cir. 1992), and DePlanche v. Califano, 549 F. Supp. 685, 693-98 (W.D. Mich. 1982). These important cases are further discussed below under "Individual's Right of Access."

One district court, in a case concerning the Privacy Act's subsection (b)(3) routine use exception, has held that a plaintiff may choose which particular "item of information" (one document) contained within a "collection or grouping of information" disclosed (a prosecutive report indicating a potential violation of law) to denominate as a "record" and challenge as wrongfully disclosed. Covert v. Harrington, 667 F. Supp. 730, 736-37 (E.D. Wash. 1987), aff'd on other grounds, 876 F.2d 751 (9th Cir. 1989). Purporting to construe the term "record" narrowly, the district court in Covert ruled that the Department of Energy's routine use--47 Fed. Reg. 14,333 (1982) (permitting disclosure of relevant records where "a record" indicates a potential violation of law)--did not permit its Inspector General to dis-

close personnel security questionnaires to the Justice Department for prosecution because the questionnaires themselves did not reveal a potential violation of law on their face. 667 F. Supp. at 736-37. Covert is further discussed below under "Conditions of Disclosure to Third Parties," "Agency Requirements," and "Civil Remedies."

Note also that purely private notes--such as personal memory refreshers--are generally not subject to the Privacy Act because they are not "agency records." See Johnston v. Horne, 875 F.2d 1415, 1423 (9th Cir. 1989); Bowyer v. United States Dep't of the Air Force, 804 F.2d 428, 431 (7th Cir. 1986); Boyd v. Secretary of the Navy, 709 F.2d 684, 686 (11th Cir. 1983) (per curiam); Sherwin v. Department of Air Force, No. 90-34-CIV-3, slip op. at 2-7 (E.D.N.C. Apr. 15, 1992), aff'd, 37 F.3d 1495 (4th Cir. 1994) (unpublished table decision); Glass v. United States Dep't of Energy, No. 87-2205, slip op. at 2 (D.D.C. Oct. 29, 1988); Mahar v. National Parks Serv., No. 86-0398, slip op. at 16-17 (D.D.C. Dec. 23, 1987); Kalmin v. Department of the Navy, 605 F. Supp. 1492, 1494-95 (D.D.C. 1985); Machen v. United States Army, No. 78-582, slip op. at 4 (D.D.C. May 11, 1979); see also OMB Guidelines, 40 Fed. Reg. at 28,952 ("[u]ncirculated personal notes, papers and records which are retained or discarded at the author's discretion and over which the agency exercises no control or dominion (e.g., personal telephone lists) are not considered to be agency records").

However, in Chapman v. NASA, 682 F.2d 526, 529 (5th Cir. 1982), the Court of Appeals for the Fifth Circuit, relying on the fair recordkeeping duties imposed by subsection (e)(5), ruled that private notes may "evanesce" into records subject to the Act when they are used to make a decision on the individual's employment status well after the evaluation period for which they were compiled. See also Lawrence v. Dole, No. 83-2876, slip op. at 5-6 (D.D.C. Dec. 12, 1985) ("[a]bsent timely incorporation into the employee's file, the private notes may not be used as a basis for an adverse employment action"); Thompson v. Department of Transp. United States Coast Guard, 547 F. Supp. 274, 283-84 (S.D. Fla. 1982) (timeliness requirement of subsection (e)(5) met where private notes upon which disciplinary action is based are placed in system of records "contemporaneously with or within a reasonable time after an adverse disciplinary action is proposed"). But cf. Sherwin, No. 90-34-CIV-3, slip op. at 2-7 (E.D.N.C. Apr. 15, 1992) (distinguishing Chapman and finding that notes of telephone conversations between two of plaintiff's supervisors concerning plaintiff were not "agency `records'" because plaintiff was "well aware of the general content" of notes, "essence" of notes was incorporated in agency's records, "private notes played no role" in plain-

tiff's discharge, and although some of notes were shared between two supervisors, "they remained personal notes at all times").

Note that publicly available information, such as newspaper clippings or press releases, can constitute a "record." See Clarkson v. IRS, 678 F.2d 1368, 1372 (11th Cir. 1982) (permitting subsection (e)(7) challenge to agency's maintenance of newsletters and press releases); Murphy v. NSA, 2 Gov't Disclosure Serv. (P-H) ¶ 81,389, at 82,036-37 (D.D.C. Sept. 29, 1981) (same as to newspaper clippings); see also OMB Guidelines, 40 Fed. Reg. 56,741, 56,742 (1975) ("[c]ollections of newspaper clippings or other published matter about an individual maintained other than in a conventional reference library would normally be a system of records"); cf. Fisher, 934 F. Supp. at 469 (discussing difference between definition of "record" for purposes of FOIA and statutory definition under Privacy Act and rejecting argument, based on FOIA case law, that "library reference materials" are not covered by Privacy Act).

One court has relied on non-Privacy Act case law concerning grand jury records to hold that a grand jury transcript, "though in possession of the U. S. Attorney, is not a record of the Justice Department within the meaning of the Privacy Act." Kotmair v. United States Dep't of Justice, No. S 94-721, slip op. at 1 (D. Md. July 12, 1994) (citing United States v. Penrod, 609 F.2d 1092, 1097 (4th Cir. 1979), for above proposition, but then confusingly not applying same theory to analysis of FOIA accessibility), aff'd, 42 F.3d 1386 (4th Cir. 1994) (unpublished table decision).

The Privacy Act--like the FOIA--does not require agencies to create records that do not exist. See DeBold v. Stimson, 735 F.2d 1037, 1041 (7th Cir. 1984); Perkins v. IRS, No. 86-CV-71551, slip op. at 4 (E.D. Mich. Dec. 16, 1986); see also, e.g., Villanueva v. Department of Justice, 782 F.2d 528, 532 (5th Cir. 1986) (rejecting argument that FBI was required to "find a way to provide a brief but intelligible explanation for its decision . . . without [revealing exempt information]"). But compare May v. Department of the Air Force, 777 F.2d 1012, 1015-17 (5th Cir. 1985) ("reasonable segregation requirement" obligates agency to create and release typewritten version of handwritten evaluation forms so as not to reveal identity of evaluator under exemption (k)(7)), with Church of Scientology W. United States v. IRS, No. CV-89-5894, slip op. at 4 (C.D. Cal. Mar. 5, 1991) (FOIA decision rejecting argument based upon May and holding that agency not required to create records).

E. System of Records

"a group of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual." 5 U.S.C. § 552a(a)(5).

comment -- The OMB Guidelines explain that a system of records exists if: (1) there is an "indexing or retrieval capability using identifying particulars [that is] built into the system"; and (2) the agency "does, in fact, retrieve records about individuals by reference to some personal identifier." OMB Guidelines, 40 Fed. Reg. 28,948, 28,952 (1975). The Guidelines state that the "is retrieved by" criterion "implies that the grouping of records under the control of an agency is accessed by the agency by use of a personal identifier; not merely that a capability or potential for retrieval exists." Id. (emphasis added).

The Court of Appeals for the District of Columbia Circuit recently addressed the "system of records" definition in the context of computerized information in Henke v. United States Dep't of Commerce, 83 F.3d 1453 (D.C. Cir. 1996), and noted that "the OMB guidelines make it clear that it is not sufficient that an agency has the capability to retrieve information indexed under a person's name, but the agency must in fact retrieve records in this way in order for a system of records to exist." Id. at 1460 n.12. The issue in Henke was whether or not computerized databases that contained information concerning technology grant proposals submitted by businesses constituted a "system of records" as to individuals listed as the "contact persons" for the grant applications, where the agency had acknowledged that "it could theoretically retrieve information by the name of the contact person." Id. at 1457-58. The D.C. Circuit looked to Congress' use of the words "is retrieved" in the statute's definition of a system of records and focused on whether the agency "in practice" retrieved information. Id. at 1459-61. The court held "that in determining whether an agency maintains a system of records keyed to individuals, the court should view the entirety of the situation, including the agency's function, the purpose for which the information was gathered, and the agency's actual retrieval practice and policies." Id. at 1461. Applying this test, the D.C. Circuit determined that the agency did "not maintain a system of records keyed to individuals listed in the contact person fields of its databases" because the agency's "purpose in requesting the name of a technical contact [was] essentially administrative and [was] not even necessary for the conduct of the [program's] operations," nor was there "any evidence that the names of contact persons [were] used regularly or even frequently

to obtain information about those persons." Id. at 1456, 1461-62. But cf. Williams v. VA, 104 F.3d 670, 674-77 & n.4 (4th Cir. 1997) (although remanding case for further factual development as to whether records were contained within system of records, and noting that it was "expressing no opinion on the Henke court's rationale when applied to circumstances where a plaintiff seeks to use retrieval capability to transform a group of records into a `system of records,' as in Henke," nevertheless finding the "narrow Henke rationale . . . unconvincing" in circumstances before the court where there "appear[ed] to exist already a formal system of records," where "published characteristics of the agency's formal system of records ha[d] not kept current with advances in and typical uses of computer technology," and where record was "poorly developed" on such point").

Two district courts have also reached this result in the context of computerized information. See Fisher v. NIH, 934 F. Supp. 464, 472-73 (D.D.C. 1996) (applying Henke and stating: "[T]he primary practice and policy of the agency [during the time of the alleged disclosures] was to index and retrieve the investigatory files by the name of the institution in which the alleged misconduct occurred, rather than by the name of the individual scientist accused of committing the misconduct. The fact that it was possible to use plaintiff's name to identify a file containing information about the plaintiff is irrelevant."), summary affirmance granted, No. 96-5252 (D.C. Cir. Nov. 27, 1996); Beckette v. United States Postal Serv., No. 88-802, slip op. at 19-22 (E.D. Va. July 3, 1989) (Although the plaintiff demonstrated that the agency "could retrieve . . . records by way of an individual's name or other personal identifier," that fact "does not make those records a Privacy Act system of records. The relevant inquiry is whether the records or the information they contain are [in fact] retrieved by name or other personal identifier.").

The D.C. Circuit in Henke, in looking to the "purpose" for which the information was gathered, also drew a distinction between information gathered for investigatory purposes and information gathered for, in that case, administrative purposes. The court stated that where information is compiled about individuals "primarily for investigatory purposes, Privacy Act concerns are at their zenith, and if there is evidence of even a few retrievals of information keyed to individuals' names, it may well be the case that the agency is maintaining a system of records." 83 F.3d at 1461; see also Fisher, 934 F. Supp. at 473 (quoting Henke but determining that agency's "primary practice and policy" was

to retrieve investigatory files by name of institution rather than by name of individual).

The highly technical "system of records" definition is perhaps the single most important Privacy Act concept, because (with some exceptions discussed below) it makes coverage under the Act dependent upon the method of retrieval of a record rather than its substantive content. See Baker v. Department of the Navy, 814 F.2d 1381, 1384 (9th Cir. 1987); Shannon v. General Elec. Co., 812 F. Supp. 308, 321 (N.D.N.Y. 1993); see also Crumpton v. United States, 843 F. Supp. 751, 755-56 (D.D.C. 1994) (although records disclosed to press under FOIA contained information about plaintiff, they were not retrieved by her name and therefore Privacy Act did not apply), aff'd on other grounds sub nom. Crumpton v. Stone, 59 F.3d 1400 (D.C. Cir. 1995), cert. denied, 116 S. Ct. 1018 (1996). Indeed, a major criticism of the Privacy Act is that it can be easily circumvented by not filing records in name-retrieved formats. See Privacy Commission Report at 503-04 & n.7. A recognition of this potential for abuse has led some courts to relax the "actual retrieval" standard in particular cases (examples given below). Moreover, certain subsections of the Act (discussed below) have been construed to apply even to records not incorporated into a "system of records."

1. Disclosure: Subsection (b)

With varying degrees of clarity, the courts generally have ruled that a disclosure in violation of subsection (b) does not occur unless the plaintiff's record was actually retrieved by reference to his name or personal identifier. See, e.g., Barhorst v. Marsh, 765 F. Supp. 995, 999-1000 (E.D. Mo. 1991) (Privacy Act claim under subsection (b) dismissed on alternative grounds where record retrieved by job announcement number, not by individual's name; noting that "`mere potential for retrieval' by name or other identifier is insufficient to satisfy the `system of records' requirement") (quoting Fagot v. FDIC, 584 F. Supp. 1168, 1175 (D.P.R. 1984), aff'd in part & rev'd in part, 760 F.2d 252 (1st Cir. 1985) (unpublished table decision)). But see Wall v. IRS, No. 1:88-CV-1942, slip op. at 3-6 (N.D. Ga. July 5, 1989) (because agency official retrieved applicant's folder by name from file maintained under vacancy announcement number, records were kept within "system of records" and thus subsection (b) was applicable).

Several courts have stated that the first element a plaintiff must prove in a wrongful disclosure suit is that the information disclosed is a record within a system of records. See Quinn v. Stone, 978 F.2d 126, 131 (3d Cir. 1992); Kinchen v. United States Postal Serv.,

No. 90-1180, slip op. at 5 (W.D. Tenn. June 17, 1994); Hass v. United States Air Force, 848 F. Supp. 926, 932 (D. Kan. 1994); Swenson v. United States Postal Serv., No. S-87-1282, slip op. at 9 (E.D. Cal. Mar. 10, 1994); see also Doe v. United States Dep't of the Interior, No. 95-1665, slip op. at 2-5 (D.D.C. Mar. 11, 1996) (alleged disclosure that plaintiff was HIV positive and had been treated for AIDS-related illnesses was not violation of Privacy Act because "[w]hile it appears to be true that some breach in confidentiality occurred . . . plaintiff cannot show that the breach stemmed from an improper disclosure of plaintiff's personnel records"); Mittleman v. United States Dep't of the Treasury, 919 F. Supp. 461, 468 (D.D.C. 1995) ("statement of general provisions of law" that was "not a disclosure of information retained in the [agency's] records on plaintiff . . . does not implicate the general nondisclosure provisions of the Privacy Act"), aff'd in part & remanded in part on other grounds, 104 F.3d 410 (D.C. Cir. 1997). In fact, the Court of Appeals for the First Circuit has held that a complaint that fails to allege a disclosure from a "system of records" is facially deficient. Beaulieu v. IRS, 865 F.2d 1351, 1352 (1st Cir. 1989); see also Whitson v. Department of the Army, No. SA-86-CA-1173, slip op. at 8-12 (W.D. Tex. Feb. 25, 1988); Bernson v. ICC, 625 F. Supp. 10, 13 (D. Mass. 1984). But see Sterling v. United States, 798 F. Supp. 47, 49 (D.D.C. 1992) (individual "not barred from stating a claim for monetary damages [under (g)(1)(D)] merely because the record did not contain `personal information' about him and was not retrieved through a search of indices bearing his name or other identifying characteristics"); see also Sterling v. United States, 826 F. Supp. 570, 571-72 (D.D.C. 1993) (subsequent opinion), summary affirmance granted, No. 93-5264 (D.C. Cir. Mar. 11, 1994).

Thus, it has frequently been held that subsection (b) is not violated when a dissemination is made on the basis of knowledge acquired independent of actual retrieval from an agency's system of records (such as a disclosure purely from memory), regardless of whether the identical information also happens to be contained in the agency's systems of records. The leading case articulating the "actual retrieval" and "independent knowledge" concepts is Savarese v. HEW, 479 F. Supp. 304, 308 (N.D. Ga. 1979), aff'd, 620 F.2d 298 (5th Cir. 1980) (unpublished table decision), where the court ruled that for a disclosure to be covered by subsection (b), "there must have initially been a retrieval from the system of records which was at some point a source of the information." 479 F. Supp. at 308. In adopting this stringent "actual retrieval" test, the court in Savarese reasoned that a more relaxed rule could result in exces-

sive governmental liability, or an unworkable requirement that agency employees "have a pansophic recall concerning every record within every system of records within the agency." Id.

There are numerous subsection (b) cases that follow Savarese and apply the "actual retrieval" and "independent knowledge" concepts in varying factual situations. See, e.g., Kline v. HHS, 927 F.2d 522, 524 (10th Cir. 1991); Manuel v. VA Hosp., 857 F.2d 1112, 1119-20 (6th Cir. 1988); Thomas v. United States Dep't of Energy, 719 F.2d 342, 344-46 (10th Cir. 1983); Boyd v. Secretary of the Navy, 709 F.2d 684, 687 (11th Cir. 1983) (per curiam); Doyle v. Behan, 670 F.2d 535, 538-39 & n.5 (5th Cir. 1982) (per curiam); Hanley v. United States Dep't of Justice, 623 F.2d 1138, 1139 (6th Cir. 1980) (per curiam); Fisher v. NIH, 934 F. Supp. 464, 473-74 (D.D.C. 1996) (plaintiff failed to demonstrate that individuals who disclosed information learned it from investigatory file or through direct involvement in investigation), summary affirmance granted, No. 96-5252 (D.C. Cir. Nov. 27, 1996); Balbinot v. United States, 872 F. Supp. 546, 549-51 (C.D. Ill. 1994); Coakley v. United States Dep't of Transp., No. 93-1420, slip op. at 2-3 (D.D.C. Apr. 7, 1994); Swenson, No. S-87-1282, slip op. at 11-19 (E.D. Cal. Mar. 10, 1994); Gibbs v. Brady, 773 F. Supp. 454, 458 (D.D.C. 1991); McGregor v. Greer, 748 F. Supp. 881, 885-86 (D.D.C. 1990); Avant v. Postal Serv., No. 88-T-173-S, slip op. at 4-5 (M.D. Ala. May 4, 1990); Howard v. Marsh, 654 F. Supp. 853, 855 (E.D. Mo. 1986); Krowitz v. USDA, 641 F. Supp. 1536, 1545 (W.D. Mich. 1986), aff'd, 826 F.2d 1063 (6th Cir. 1987) (unpublished table decision); Blanton v. United States Dep't of Justice, No. 82-0452, slip op. at 4-5 (D.D.C. Feb. 17, 1984); Sanchez v. United States, 3 Gov't Disclosure Serv. (P-H) ¶ 83,116, at 83,708-09 (S.D. Tex. Sept. 10, 1982); Golliher v. United States Postal Serv., 3 Gov't Disclosure Serv. (P-H) ¶ 83,114, at 83,703 (N.D. Ohio June 10, 1982); Thomas v. United States Dep't of the Navy, No. C81-0654-L(A), slip op. at 2-3 (W.D. Ky. Nov. 4, 1982), aff'd, 732 F.2d 156 (6th Cir. 1984) (unpublished table decision); Olberding v. DOD, 564 F. Supp. 907, 913 (S.D. Iowa 1982), aff'd per curiam, 709 F.2d 621 (8th Cir. 1983); Balk v. United States Int'l Communications Agency, No. 81-0896, slip op. at 2-4 (D.D.C. May 7, 1982), aff'd, 704 F.2d 1293 (D.C. Cir. 1983) (unpublished table decision); Johnson v. United States Dep't of the Air Force, 526 F. Supp. 679, 681 (W.D. Okla. 1980), aff'd, 703 F.2d 583 (Fed. Cir. 1981) (unpublished table decision); Carin v. United States, 1 Gov't Disclosure Serv. (P-H) ¶ 80,193, at 80,491-92 (D.D.C. Aug. 5, 1980); Jackson v. VA, 503 F. Supp. 653, 655-57 (N.D. Ill. 1980); King v. Califano, 471 F. Supp. 180, 181 (D.D.C. 1979);

Greene v. VA, No. C-76-461-S, slip op. at 6-7 (M.D.N.C. July 3, 1978); see also Stephens v. TVA, 754 F. Supp. 579, 582 (E.D. Tenn. 1990) (comparing Olberding and Jackson and noting "confusion in the law with respect to whether the Privacy Act bars the disclosure of personal information obtained indirectly as opposed to directly from a system of records"); cf. Rice v. United States, No. 96-0078, 1997 U.S. Dist. LEXIS 11574, at **2-4, 16-18 (D.N.M. July 2, 1997) (quoting Thomas and finding that IRS's disclosure in two press releases of information regarding plaintiff's criminal trial and conviction of felony federal tax crimes, and IRS's informing individual taxpayer that plaintiff could no longer represent him before IRS due to conviction, were disclosures of information that was gathered by agency Public Affairs Specialist by attending plaintiff's trial and from public documents, not from agency "system of records") (appeal pending); Viotti v. United States Air Force, 902 F. Supp. 1331, 1338 (D. Colo. 1995) ("Section 552a(b) contemplates a `system of records' as being the direct or indirect source of the information disclosed" and although agency employee admitted disclosure of information to press "based on personal knowledge," plaintiff "was obligated to come forward with some evidence indicating the existence of a triable issue of fact as to the identity of the `indirect' source" of disclosure to press); Mittleman, 919 F. Supp. at 469 (although no evidence indicated that there had been disclosure of information about plaintiff, even assuming there had been, information at issue would not have been subject to restrictions of Privacy Act because "it was a belief . . . derived from conversations . . . and which was acquired independent from a system of records"); Doe v. United States Dep't of the Interior, No. 95-1665, slip op. at 4-5 (D.D.C. Mar. 11, 1996) (where plaintiff could "not show that the breach [in confidentiality] stemmed from an improper disclosure of [his] records," stating further that "[t]his is especially true in light of the fact that several other employees knew of, and could have told . . . of, plaintiff's illness").

However, the Court of Appeals for the District of Columbia Circuit, in Bartel v. FAA, 725 F.2d 1403, 1408-11 (D.C. Cir. 1984), suggested that the "actual retrieval" standard is inapplicable where a disclosure is undertaken by agency personnel who had a role in creating the record that contains the released information. This particular aspect of Bartel has been noted with approval by several other courts. See Manuel, 857 F.2d at 1120 & n.1; Pilon v. United States Dep't of Justice, 796 F. Supp. 7, 12 (D.D.C. 1992) (denying agency's motion to dismiss or alternatively for summary judgment where information "obviously stem[med] from confidential

Department documents and oral statements derived therefrom"); Kassel v. VA, 709 F. Supp. 1194, 1201 (D.N.H. 1989); Cochran v. United States, No. 83-216, slip op. at 9-13 (S.D. Ga. July 2, 1984), aff'd, 770 F.2d 949 (11th Cir. 1985); Fitzpatrick v. IRS, 1 Gov't Disclosure Serv. (P-H) ¶ 80,232, at 80,580 (N.D. Ga. Aug. 22, 1980), aff'd in part, vacated & remanded in part, on other grounds, 665 F.2d 327 (11th Cir. 1982). But cf. Abernethy v. IRS, 909 F. Supp. 1562, 1570 (N.D. Ga. 1995) (holding that alleged statements made to other IRS employees that plaintiff was being investigated pertaining to allegations of EEO violations, assuming they were in fact made, did not violate the Act "because information allegedly disclosed was not actually retrieved from a system of records" even though individual alleged to have made such statements was same individual who ordered investigation), aff'd, No. 95-9489 (11th Cir. Feb. 13, 1997).

In particular, the Court of Appeals for the Ninth Circuit recently held that an Administrative Law Judge for the Department of Health and Human Services violated the Privacy Act when he stated in an opinion that one of the parties' attorneys had been placed on a Performance Improvement Plan (PIP) while he was employed at HHS--despite the fact that there was no actual retrieval by the ALJ--because, as the creator of the PIP, the ALJ had personal knowledge of the matter. Wilborn v. HHS, 49 F.3d 597, 600-02 (9th Cir. 1995). The Ninth Circuit noted the similarity of the facts to those of Bartel and held that "`independent knowledge,' gained by the creation of records, cannot be used to sidestep the Privacy Act." Id. at 601. Additionally, it rejected the lower court's reasoning that not only was there no retrieval, but there was no longer a record capable of being retrieved because as the result of a grievance action, all records relating to the PIP had been required to be expunged from the agency's records and in fact were expunged by the ALJ himself. Id. at 599-602. The Ninth Circuit found the district court's ruling "inconsistent with the spirit of the Privacy Act," and stated that the "fact that the agency ordered expungement of all information relating to the PIP makes the ALJ's disclosure, if anything, more rather than less objectionable." Id. at 602.

2. Access and Amendment: Subsections (d)(1) and (d)(2)

One of Congress's underlying concerns in narrowly defining a "system of records" appears to have been efficiency--i.e., a concern that any broader definition would require elaborate cross-references among records and/or burdensome hand-searches for records. See OMB Guidelines,

40 Fed. Reg. at 28,957; see also Baker v. Department of the Navy, 814 F.2d 1381, 1385 (9th Cir. 1987); Carpenter v. IRS, 938 F. Supp. 521, 522-23 (S.D. Ind. 1996).

Consistent with OMB's guidance, numerous courts have held that, under subsection (d)(1), an individual has no Privacy Act right of access to his record if it is not indexed and retrieved by his name or personal identifier. See Williams v. VA, 104 F.3d 670, 673 (4th Cir. 1997); Manuel v. VA Hosp., 857 F.2d 1112, 1116-17 (6th Cir. 1988); Baker, 814 F.2d at 1383-84; Cuccaro v. Secretary of Labor, 770 F.2d 355, 360-61 (3d Cir. 1985); Wren v. Heckler, 744 F.2d 86, 89 (10th Cir. 1984); Springmann v. United States Dep't of State, No. 93-1238, slip op. at 9 n.2 (D.D.C. Apr. 21, 1997); Fuller v. IRS, No. 96-888, 1997 WL 191034, at **3-5 (W.D. Pa. Mar. 4, 1997) (appeal pending); Carpenter, 938 F. Supp. at 522-23; Quinn v. HHS, 838 F. Supp. 70, 76 (W.D.N.Y. 1993); Shewchun v. United States Customs Serv., No. 87-2967, slip op. at 3-4 (D.D.C. Jan. 11, 1989); Bryant v. Department of the Air Force, No. 85-4096, slip op. at 4 (D.D.C. Mar. 31, 1986); Fagot v. FDIC, 584 F. Supp. 1168, 1174-75 (D.P.R. 1984), aff'd in part & rev'd in part, 760 F.2d 252 (1st Cir. 1985) (unpublished table decision); Grachow v. United States Customs Serv., 504 F. Supp. 632, 634-36 (D.D.C. 1980); Smiertka v. United States Dep't of the Treasury, 447 F. Supp. 221, 228 (D.D.C. 1978), remanded on other grounds, 604 F.2d 698 (D.C. Cir. 1979); see also OMB Guidelines, 40 Fed. Reg. at 28,957 (giving examples).

Likewise, with regard to amendment, several courts have ruled that where an individual's record is being maintained allegedly in violation of subsection (e)(1) or (e)(5), the individual has no Privacy Act right to amend his record, under subsection (d)(2), if it is not indexed and retrieved by his name or personal identifier. See Baker, 814 F.2d at 1384-85 ("the scope of accessibility and the scope of amendment are coextensive"); Pototsky v. Department of the Navy, 717 F. Supp. 20, 22 (D. Mass. 1989) (following Baker), aff'd per curiam, 907 F.2d 142 (1st Cir. 1990) (unpublished table decision); see also Clarkson v. IRS, 678 F.2d 1368, 1377 (11th Cir. 1982) (subsections (e)(1) and (e)(5) apply only to records contained in system of records).

However, with respect to access under subsection (d)(1), and amendment under subsection (d)(2), several courts have cautioned that an agency's purposeful filing of records in a non-name retrieved format, in order to evade those provisions, will not be permitted. See, e.g., Pototsky v. Department of the Navy, No. 89-1891, slip op. at 2 (1st Cir. Apr. 3, 1990) (per curi-

am); Baker, 814 F.2d at 1385; Kalmin v. Department of the Navy, 605 F. Supp. 1492, 1495 n.5 (D.D.C. 1985); see also Manuel, 857 F.2d at 1120 ("The Court does not want to give a signal to federal agencies that they should evade their responsibility to place records within their `system of records' in violation of the [Act].").

Following the rationale of the Fifth Circuit Court of Appeals in Chapman v. NASA, 682 F.2d 526, 529 (5th Cir. 1982), several courts have recognized a subsection (e)(5) duty to incorporate records into a system of records (thus making them subject to access and amendment) where such records are used by the agency in taking an adverse action against the individual. See MacDonald v. VA, No. 87-544-CIV-T-15A, slip op. at 2-5 (M.D. Fla. Feb. 8, 1988); Lawrence v. Dole, No. 83-2876, slip op. at 5-6 (D.D.C. Dec. 12, 1985); Waldrop v. United States Dep't of the Air Force, 3 Gov't Disclosure Serv. (P-H) ¶ 83,016, at 83,453 (S.D. Ill. Aug. 5, 1981); Nelson v. EEOC, No. 83-C-983, slip op. at 6-11 (E.D. Wis. Feb. 14, 1984); cf. Manuel, 857 F.2d at 1117-19 (no duty to place records within system of records where records "are not part of an official agency investigation into activities of the individual requesting the records, and where the records requested do not have an adverse effect on the individual"). But cf. Gowan v. Department of the Air Force, No. 90-94, slip op. at 7, 11, 13, 16, 30, 33 (D.N.M. Sept. 1, 1995) (although ultimately finding access claim moot, stating that "personal notes and legal research" in file "marked `Ethics'" that was originally kept in desk of Deputy Staff Judge Advocate but that was later given to Criminal Military Justice Section and used in connection with court martial hearing were not in system of records for purposes of either Privacy Act access or accuracy lawsuit for damages) (appeal pending).

3. Other Aspects

The "system of records" threshold requirement is not necessarily applicable to all subsections of the Act. See OMB Guidelines, 40 Fed. Reg. at 28,952 (system of records definition "limits the applicability of some of the provisions of the Act") (emphasis added). But see Privacy Commission Report at 503-04 (assuming definition limits entire Act).

For example, in Albright v. United States, 631 F.2d 915, 918-20 (D.C. Cir. 1980), the Court of Appeals for the District of Columbia Circuit held that subsection (e)(7)--which restricts agencies from maintaining records describing how an individual exercises his First Amendment rights--applies even to records not incorporated into a system of records. Albright involved a challenge on subsection (e)(7) grounds to an agency's maintenance of a videotape--kept in a file cabinet in an envelope that was not labeled by any individual's name--of a meeting between a personnel officer and agency employees affected by the officer's job reclassification decision. Id. at 918. Relying on both the broad definition of "maintain" (5 U.S.C. § 552a(a)(3)) and the "special and sensitive treatment accorded First Amendment rights," the D.C. Circuit held that the mere collection of a record regarding those rights could be a violation of subsection (e)(7), regardless of whether the record was contained in a system of records retrieved by an individual's name or personal identifier. Id. at 919-20.

Albright's broad construction of subsection (e)(7) has been adopted by several other courts. See MacPherson v. IRS, 803 F.2d 479, 481 (9th Cir. 1986); Boyd, 709 F.2d at 684; Clarkson, 678 F.2d at 1373-77; Fagot, 584 F. Supp. at 1175. Further, the Court of Appeals for the Eleventh Circuit in Clarkson, 678 F.2d at 1375-77, held that, at least with respect to alleged violations of subsection (e)(7), the Act's amendment provision (subsection (d)(2)) also can apply to a record not incorporated into a system of records. However, Judge Tjoflat's concurring opinion in Clarkson intimated that something more than a bare allegation of a subsection (e)(7) violation would be necessary in order for an agency to be obligated to search beyond its systems of records for potentially offensive materials. Id. at 1378-79.

Two district courts have gone even further. In Connelly v. Comptroller of the Currency, 673 F. Supp. 1419, 1424 (S.D. Tex. 1987), rev'd on other grounds, 876 F.2d 1209 (5th Cir. 1989), the court construed the broad "any record" language contained in 5 U.S.C. § 552a(g)(1)(C) to permit a damages action arising from an allegedly inac-

curate record that was not incorporated into a system of records. In a subsequent opinion, the court in Connelly went on to find a cause of action under subsections (e)(5) and (g)(1)(C) with regard to records not in a system. Connelly v. Comptroller of the Currency, No. H-84-3783, slip op. at 3-4, 42-43 (S.D. Tex. June 3, 1991). In Reuber v. United States, No. 81-1857, slip op. at 5 (D.D.C. Oct. 27, 1982), partial summary judgment denied (D.D.C. Aug. 15, 1983), partial summary judgment granted (D.D.C. Apr. 13, 1984), subsequent decision (D.D.C. Sept. 6, 1984), aff'd, 829 F.2d 133 (D.C. Cir. 1987), the court relied on Albright for the proposition that subsections (d)(2), (e)(1)-(2), (e)(5)-(7), and (e)(10) all apply to a record not incorporated into a system of records. See also Fiorella v. HEW, 2 Gov't Disclosure Serv. (P-H) ¶ 81,363, at 81,946 n.1 (W.D. Wash. Mar. 9, 1981) (noting that subsections (e)(5) and (e)(7) "are parallel in structure and would seem to require the same statutory construction"). But see Barhorst, 765 F. Supp. at 999-1000 (dismissing on alternative grounds Privacy Act claims under subsections (b), (e)(1)-(3), (e)(5)-(6), and (e)(10) because information found not in system of records; information was retrieved by job announcement number, not by name or other identifying particular).

Albright and its progeny establish that the "system of records" limitation on the scope of the Act is not uniformly applicable to all of the statute's subsections. As is apparent from the above discussion, there is some uncertainty about which particular subsections of the statute are limited to records contained in a "system of records."

CONDITIONS OF DISCLOSURE TO THIRD PARTIES

A. The "No Disclosure Without Consent" Rule

"No agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains [subject to 12 exceptions]." 5 U.S.C. § 552a(b).

comment -- A "disclosure" can be by any means of communication--written, oral, electronic, or mechanical. See OMB Guidelines, 40 Fed. Reg. 28,948, 28,953 (1975).

A plaintiff has the burden of demonstrating that a disclosure by the agency has occurred. See, e.g., Askew v. United States, 680 F.2d 1206, 1209-11 (8th Cir. 1982); Zerilli v. Smith, 656 F.2d 705, 715-16 (D.C. Cir. 1981).

It has frequently been held that a "disclosure" under the Privacy Act does not occur if the communication is to a person who is already aware of the information. See, e.g., Quinn v. Stone, 978 F.2d 126, 134 (3d Cir. 1992) (dictum); Kline v. HHS, 927 F.2d 522, 524 (10th Cir. 1991); Hollis v. United States Dep't of the Army, 856 F.2d 1541, 1545 (D.C. Cir. 1988); Reyes v. Supervisor of DEA, 834 F.2d 1093, 1096 n.1 (1st Cir. 1987); Schowengerdt v. General Dynamics Corp., 823 F.2d 1328, 1341 (9th Cir. 1987); Pellerin v. VA, 790 F.2d 1553, 1556 (11th Cir. 1986); FDIC v. Dye, 642 F.2d 833, 836 (5th Cir. 1981); Ash v. United States, 608 F.2d 178, 179 (5th Cir. 1979); Sullivan v. United States Postal Serv., 944 F. Supp. 191, 196 (W.D.N.Y. 1996); Viotti v. United States Air Force, 902 F. Supp. 1331, 1337 (D. Colo. 1995); Abernethy v. IRS, 909 F. Supp. 1562, 1571 (N.D. Ga. 1995), aff'd, No. 95-9489 (11th Cir. Feb. 13, 1997); Kassel v. VA, 709 F. Supp. 1194, 1201 (D.N.H. 1989); Krowitz v. USDA, 641 F. Supp. 1536, 1545 (W.D. Mich. 1986), aff'd, 826 F.2d 1063 (6th Cir. 1987) (unpublished table decision); Golliher v. United States Postal Serv., 3 Gov't Disclosure Serv. ¶ 83,114, at 83,702 (N.D. Ohio June 10, 1982); King v. Califano, 471 F. Supp. 180, 181 (D.D.C. 1979); Harper v. United States, 423 F. Supp. 192, 197 (D.S.C. 1976); see also Loma Linda Community Hosp. v. Shalala, 907 F. Supp. 1399, 1404-05 (C.D. Cal. 1995) (policy underlying Privacy Act of protecting confidential information from disclosure not implicated by release of information health care provider had already received through patients' California "Medi-Cal" cards); Owens v. MSPB, No. 3-83-0449-R, slip op. at 2-3 (N.D. Tex. Sept. 14, 1983) (mailing of agency decision affirming employee's removal to his former attorney held not a "disclosure" as "attorney was familiar with facts of [employee's] claim" and "no new information was disclosed to him").

However, the Court of Appeals for the District of Columbia Circuit recently clarified that this principle does not apply to all disseminations of protected records to individuals with prior knowledge of their existence or contents. Pilon v. United States Dep't of Justice, 73 F.3d 1111, 1117-24 (D.C. Cir. 1996). In Pilon, the D.C. Circuit held that the Justice Department's transmission of a Privacy Act-protected record to a former employee of the agency constituted a "disclosure" under the Privacy Act, even though the recipient had come "into contact with the [record] in the course of his duties" while an employee. Id. The Court's "review of the Privacy Act's purposes, legislative history, and integrated structure convince[d it] that Congress intended the term `disclose' to apply in virtually all instances to an agency's unauthorized transmission of a protected record, regard-

less of the recipient's prior familiarity with it." Id. at 1124.

In an earlier case, Hollis v. United States Dep't of the Army, 856 F.2d 1541 (D.C. Cir. 1988), the D.C. Circuit had held that the release of a summary of individual child-support payments previously deducted from plaintiff's salary and sent directly to his ex-wife, who had requested it for use in pending litigation, was not an unlawful disclosure under the Privacy Act as she, being the designated recipient of the child-support payments, already knew what had been remitted to her. Id. at 1545. In Pilon, the D.C. Circuit reconciled its opinion in Hollis by "declin[ing] to extend Hollis beyond the limited factual circumstances that gave rise to it," 73 F.3d at 1112, 1124, and holding that:

> [A]n agency's unauthorized release of a protected record does constitute a disclosure under the Privacy Act except in those rare instances, like Hollis, where the record merely reflects information that the agency has previously, and lawfully, disseminated outside the agency to the recipient, who is fully able to reconstruct its material contents.

Id. at 1124; cf. Osborne v. United States Postal Serv., No. 94-30353, slip op. at 2-4, 6-11 (N.D. Fla. May 18, 1995) (assuming without discussion that disclosure of plaintiff's injury-compensation file to retired employee who had prepared file constituted "disclosure" for purposes of Privacy Act).

A few courts, though, have extended the principle that there is no "disclosure" to rule that the release of previously published or publicly available information is not a Privacy Act "disclosure"--regardless of whether the particular persons who received the information were aware of the previous publication. See FDIC v. Dye, 642 F.2d at 836; Lee v. Dearment, No. 91-2175, slip op. at 4 (4th Cir. June 3, 1992); Gowan v. Department of the Air Force, No. 90-94, slip op. at 32 (D.N.M. Sept. 1, 1995) (appeal pending); Smith v. Continental Assurance Co., No. 91-C-0963, 1991 WL 164348, at *5 (N.D. Ill. Aug. 22, 1991); Friedlander v. United States Postal Serv., No. 84-0773, slip op. at 8 (D.D.C. Oct. 16, 1984); King, 471 F. Supp. at 181. But see Quinn, 978 F.2d at 134 (holding that release of information that is "merely readily accessible" to public "is a disclosure under 552a(b)"); cf. Pilon v. United States Dep't of Justice, 796 F. Supp. 7, 11-12 (D.D.C. 1992) (rejecting argument that information was already public and therefore could not violate Privacy Act where agency had republished statement that was previously

publicly disavowed as false by agency). The Court of Appeals for the District of Columbia Circuit had recognized in dictum that other courts had so held, and perhaps had indicated a willingness to go that far. Hollis, 856 F.2d at 1545 (holding that disclosure did not violate Privacy Act because recipient of information was already aware of it, but stating that "[o]ther courts have echoed the sentiment that when a release consists merely of information to which the general public already has access, or which the recipient of the release already knows, the Privacy Act is not violated").

However, the D.C. Circuit's more recent holding in Pilon v. United States Dep't of Justice, 73 F.3d 1111 (D.C. Cir. 1996), discussed above, seems to foreclose such a possibility. In Pilon, the D.C. Circuit further held that even under the narrow Hollis interpretation of "disclose," the agency would not be entitled to summary judgment because it had "failed to adduce sufficient evidence that [the recipient of the record] remembered and could reconstruct the document's material contents in detail at the time he received it." 73 F.3d at 1124-26. Nevertheless, the D.C. Circuit in Pilon noted that "[t]his case does not present the question of whether an agency may . . . release a document that has already been fully aired in the public domain through the press or some other means" but that "the Privacy Act approves those disclosures that are `required' under the [FOIA] . . . and that under various FOIA exemptions, prior publication is a factor to be considered in determining whether a document properly is to be released." Id. at 1123 n.10. Furthermore, though, and consistent with the D.C. Circuit's note in Pilon, one might argue that to say that no "disclosure" occurs for previously published or public information is at least somewhat inconsistent with the Supreme Court's decision in United States Department of Justice v. Reporters Committee for Freedom of the Press, 489 U.S 749, 762-71 (1989), which held that a privacy interest can exist, under the FOIA, in publicly available--but "practically obscure"--information, such as a criminal history record. Cf. Finley v. National Endowment for the Arts, 795 F. Supp. 1457, 1468 (C.D. Cal. 1992) (alleged disclosure of publicly available information states claim for relief under Privacy Act; recognizing Reporters Committee).

The Act's legislative history indicates that a court is not a "person" or "agency" within the meaning of subsection (b), and that the Act was "not designed to interfere with access to information by the courts." 120 Cong. Rec. 36,967 (1974), reprinted in Source Book at 958-59. However, the public filing of records with a court, during the course of litigation, does

constitute a subsection (b) disclosure. See Laningham v. United States Navy, No. 83-3238, slip op. at 2-3 (D.D.C. Sept. 25, 1984), summary judgment granted (D.D.C. Jan. 7, 1985), aff'd per curiam, 813 F.2d 1236 (D.C. Cir. 1987); Citizens Bureau of Investigation v. FBI, No. 78-60, slip op. at 2-3 (N.D. Ohio Dec. 14, 1979); cf. Schwartz v. United States Dep't of Justice, No. 94 CIV. 7476, 1995 WL 675462, at *8 (S.D.N.Y. Nov. 14, 1995) (plaintiff "waived any privacy interest" in record "through his own voluntary disclosure of its contents in these [court] proceedings"), aff'd, 101 F.3d 686 (2d Cir. 1996) (unpublished table decision). Accordingly, any such public filing must be undertaken with written consent or in accordance with either the subsection (b)(3) routine use exception or the subsection (b)(11) court order exception, both discussed below.

Often during the course of litigation, an agency will be asked to produce Privacy Act-protected information pursuant to a discovery request by an opposing party. An agency in receipt of such a request must object on the ground that the Privacy Act prohibits disclosure. Although courts have unanimously held that the Privacy Act does not create a discovery privilege, see Laxalt v. McClatchy, 809 F.2d 885, 888-90 (D.C. Cir. 1987); Weahkee v. Norton, 621 F.2d 1080, 1082 (10th Cir. 1980); Forrest v. United States, No. 95-3889, 1996 WL 171539, at *2 (E.D. Pa. Apr. 11, 1996); Ford Motor Co. v. United States, 825 F. Supp. 1081, 1083 (Ct. Int'l Trade 1993); Clavir v. United States, 84 F.R.D. 612, 614 (S.D.N.Y. 1979); cf. Baldrige v. Shapiro, 455 U.S. 345, 360-62 (1982) (Census Act constitutes privilege because it "embod[ies] explicit congressional intent to preclude all disclosure"), an agency can disclose Privacy Act-protected records only as permitted by the Act. The most appropriate method of disclosure in this situation is pursuant to a (b)(11) court order. See generally Doe v. DiGenova, 779 F.2d 74 (D.C. Cir. 1985); Doe v. Stephens, 851 F.2d 1457 (D.C. Cir. 1988) (both discussed below under subsection (b)(11)). Indeed, the courts that have rejected the Privacy Act as a discovery privilege have pointed to subsection (b)(11)'s allowance for court-ordered disclosures in support of their holdings. See Laxalt, 809 F.2d at 888-89; Weahkee, 621 F.2d at 1082; Forrest, 1996 WL 171539, at *2; Ford Motor Co., 825 F. Supp. at 1082-83; Clavir, 84 F.R.D. at 614; see also Tootle v. Seaboard Coast Line R.R. Co., 468 So. 2d 237, 239 (Fla. Dist. Ct. App. 1984) (recognizing that privacy interests in that case "must give way to the function of the discovery of facts" and that subsection (b)(11) provides the mechanism for disclosure); cf. Alford v. Todco, No. CIV-88-731E, slip op. at 4-5 (W.D.N.Y. June 12, 1990) ("Even assuming the Privacy Act sup-

plies a statutory privilege . . . the plaintiff has waived any such privilege by placing his physical condition at issue"; ordering production of records).

On the other hand, when an agency wishes to make an affirmative disclosure of information during litigation it may either rely on a routine use permitting such disclosure or seek a court order. Because the Privacy Act does not constitute a statutory privilege, agencies need not worry about violating or waiving such a privilege when disclosing information pursuant to subsections (b)(3) or (b)(11). Cf. Mangino v. Department of the Army, No. 94-2067, 1994 WL 477260, at **5-6 (D. Kan. Aug. 24, 1994) (finding that disclosure to court was appropriate pursuant to agency routine use and stating that to extent Privacy Act created privilege, such privilege was waived by plaintiff when he placed his records at issue); Lemasters v. Thomson, No. 92 C 6158, 1993 U.S. Dist. LEXIS 7513, at **3-8 (N.D. Ill. June 3, 1993) (same finding as in Mangino, despite fact that "court ha[d] not located" applicable routine use). For further discussions of disclosures during litigation, see discussions of subsections (b)(3) and (b)(11), below.

By its own terms, subsection (b) does not prohibit an agency from releasing to an individual his own record, contained in a system of records retrieved by his name or personal identifier, in response to his "first-party" access request under subsection (d)(1). However, as is discussed below under "Individual's Right of Access," one exception to this point could conceivably arise in the first-party access context where a record is also about another individual and is "dually retrieved." Such a position has been rejected, though, by the only court to consider it. See Topuridze v. USIA, 772 F. Supp. 662, 665-66 (D.D.C. 1991).

Additionally, although it may seem self-evident, the factual pattern in one case caused a court to explicitly hold that an agency cannot be sued for disclosures which an individual makes himself. Abernethy, 909 F. Supp. at 1571 (plaintiff had informed employees that he was being removed from his position as their supervisor and reason for his removal).

The Act does not define "written consent." Implied consent has been held to be insufficient. See Taylor v. Orr, No. 83-0389, slip op. at 5 n.6 (D.D.C. Dec. 5, 1983) ("[i]mplied consent is never enough" as the Act's protections "would be seriously eroded if plaintiff's written submission of [someone's] name were construed as a voluntary written consent to the disclosure of her [medical] records to him"). But see OMB

Guidelines, 40 Fed. Reg. 56,741, 56,742 (1975) (consent may be implied when responding to inquiry from Member of Congress acting on basis of written request for assistance from constituent); Pellerin, 790 F.2d at 1556 (applying doctrine of "equitable estoppel" to bar individual from complaining of disclosure of his record to congressmen "when he requested their assistance in gathering such information") (distinguished in Swenson v. United States Postal Serv., 890 F.2d 1075, 1077-78 (9th Cir. 1989)); cf. Baitey v. VA, No. 8:CV89-706, slip op. at 5 (D. Neb. June 21, 1995) ("at a minimum, the phrase `written consent' necessarily requires either (1) a medical authorization signed by [plaintiff] or (2) conduct which, coupled with the unsigned authorization, supplied the necessary written consent for the disclosure").

The scope of express consent, however, cannot be "so vague or general that it is questionable whether [the individual] knew what he was authorizing or whether the [agency] knew what documents it could lawfully release." Perry v. FBI, 759 F.2d 1271, 1276 (7th Cir. 1985), rev'd en banc on other grounds, 781 F.2d 1294 (7th Cir. 1986); see also American Fed'n of Gov't Employees v. United States R.R. Retirement Bd., 742 F. Supp. 450, 457 (N.D. Ill. 1990) (SF-86 "release form" held overbroad and contrary to subsection (b)); Taylor, No. 83-0389, slip op. at 5 n.6 (D.D.C. Dec. 5, 1983) ("It is not unreasonable to require that a written consent to disclosure address the issue of such disclosure and refer specifically to the records permitted to be disclosed."); Thomas v. VA, 467 F. Supp. 458, 460 n.4 (D. Conn. 1979) (consent held adequate as it was both agency- and record-specific); cf. Doe v. GSA, 544 F. Supp. 530, 539-41 (D. Md. 1982) (authorization which was neither record- nor entity-specific was insufficient under GSA's own internal interpretation of Privacy Act). The OMB Guidelines caution that "the consent provision was not intended to permit a blanket or open-ended consent clause, i.e., one which would permit the agency to disclose a record without limit," and that, "[a]t a minimum, the consent clause should state the general purposes for, or types of recipients[to,] which disclosure may be made." 40 Fed. Reg. at 28,954.

In light of the D.C. Circuit's decision in Summers v. United States Dep't of Justice, 999 F.2d 570, 572-73 (D.C. Cir. 1993), agencies whose regulations require that privacy waivers be notarized to verify identity must also accept declarations in accordance with 28 U.S.C. § 1746 (1994) (i.e., an unsworn declaration subscribed to as true under penalty of perjury). See, e.g., Revised Department of Justice Freedom of Information Act and Privacy Act Regulations, 62

Fed. Reg. 45,184, 45,192 (1997) (to be codified at 28 C.F.R. pt. 16) (proposed August 26, 1997).

B. Twelve Exceptions to the "No Disclosure Without Consent" Rule

Note that with the exception of disclosures under subsection (b)(2) (see discussion below), disclosures under the following exceptions are permissive, not mandatory. See OMB Guidelines, 40 Fed. Reg. at 28,953.

1. 5 U.S.C. § 552a(b)(1) ("need to know" within agency)

"to those officers and employees of the agency which maintains the record who have a need for the record in the performance of their duties."

comment -- This "need to know" exception authorizes the intra-agency disclosure of a record for necessary, official purposes. See OMB Guidelines, 40 Fed. Reg. 28,948, 28,950-01 (1975); 120 Cong. Rec. 36,967 (1974), reprinted in Source Book at 958 (recognizing propriety of "need to know" disclosures between Justice Department components).

Intra-agency disclosures for improper purposes will not be condoned. See, e.g., Parks v. IRS, 618 F.2d 677, 680-81 & n.1 (10th Cir. 1980) (publication of names of employees who did not purchase savings bonds, "for solicitation purposes," held improper); MacDonald v. VA, No. 87-544-CIV-T-15A, slip op. at 8-9 (M.D. Fla. July 28, 1989) (disclosure of counseling memorandum in "callous attempt to discredit and injure" employee held improper); Koch v. United States, No. 78-273T, slip op. at 1-2 (W.D. Wash. Dec. 30, 1982) (letter of termination posted in agency's entrance hallway held improper); Smigelsky v. United States Postal Serv., No. 79-110-RE, slip op. at 3-4 (D. Or. Oct. 1, 1982) (publication of employees' reasons for taking sick leave held improper); Fitzpatrick v. IRS, 1 Gov't Disclosure Serv. (P-H) ¶ 80,232, at 80,580 (N.D. Ga. Aug. 22, 1980) (disclosure of fact that employee's absence was due to "mental problems" held improper; "quelling rumors and gossip [and] satisfying curiosity is not to be equated with a need to know"), aff'd in part, vacated & remanded in part, on other grounds, 665 F.2d 327 (11th Cir. 1982).

The cases are replete with examples of proper intra-agency "need to know" disclosures. See, e.g., Mount v. United States Postal Serv., 79 F.3d 531, 533-34 (6th Cir. 1996) (disclosure of information in plaintiff's medical records to other employees "with responsibilities for making employment

and/or disciplinary decisions regarding plaintiff"; "In light of the questions surrounding plaintiff's mental stability, each had at least an arguable need to access the information in plaintiff's medical records."); Britt v. Naval Investigative Serv., 886 F.2d 544, 549 n.2 (3d Cir. 1989) (disclosure of investigative report to commanding officer approved "since the Reserves might need to reevaluate Britt's access to sensitive information or the level of responsibility he was accorded"); Covert v. Harrington, 876 F.2d 751, 753-54 (9th Cir. 1989) (disclosure of security questionnaires to Inspector General for purpose of detecting fraud); Daly-Murphy v. Winston, 837 F.2d 348, 354-55 (9th Cir. 1988) (disclosure of letter suspending doctor's clinical privileges to participants in peer-review proceeding); Lukos v. IRS, No. 86-1100, slip op. at 2-3 (6th Cir. Feb. 12, 1987) (disclosure of employee's arrest record to supervisor for purpose of evaluating his conduct and to effect discipline); Howard v. Marsh, 785 F.2d 645, 647-49 (8th Cir. 1986) (disclosure of employee's personnel records to agency attorney and personnel specialist for purpose of preparing response to discrimination complaint); Hernandez v. Alexander, 671 F.2d 402, 410 (10th Cir. 1982) (disclosure of employee's EEO files to personnel advisors for purpose of determining whether personnel action should be taken against employee); Grogan v. IRS, 3 Gov't Disclosure Serv. (P-H) ¶ 82,385, at 82,977-78 (4th Cir. Mar. 22, 1982) (disclosure of questionable income tax returns prepared by professional tax preparer while he was IRS employee to IRS examiners for purpose of alerting them to possible irregularities); Beller v. Middendorf, 632 F.2d 788, 798 n.6 (9th Cir. 1980) (disclosure of record revealing serviceman's homosexuality by Naval Investigative Service to commanding officer for purpose of reporting "a ground for discharging someone under his command"); Porter v. United States Postal Serv., No. CV595-30, slip op. at 23-24 (S.D. Ga. July 24, 1997) (disclosure of employee's medical records to supervisory personnel in order to "figure out exactly what level of duty [employee] was fit and able to perform") (appeal pending); Jones v. Department of the Air Force, 947 F. Supp. 1507, 1515-16 (D. Colo. 1996) (Air Force investigator's review of plaintiff's medical and mental health records and publication of statements about the records in report of investigation compiled in preparation for plaintiff's court-martial, which was distributed to certain Air Force personnel); Viotti v. United States Air Force, 902 F. Supp. 1331, 1337 (D. Colo. 1995) (disclo-

sure by general to academic department staff that he was removing acting head of department because he had lost confidence in his leadership; subsequent disclosure by new head of department to department staff of same information regarding removal of prior department head); Abernethy v. IRS, 909 F. Supp. 1562, 1570-71 (N.D. Ga. 1995) ("[investigatory] panel's review of Plaintiff's performance appraisals was not a violation of the Privacy Act because the members had a need to know the contents of the appraisals"; member of panel that recommended that plaintiff be removed from management in response to EEO informal class complaint "had a need to know the contents of the [EEO] complaint file"), aff'd, No. 95-9489 (11th Cir. Feb. 13, 1997); Magee v. United States Postal Serv., 903 F. Supp. 1022, 1029 (W.D. La. 1995) (disclosure of employee's medical report following fitness-for-duty examination to Postmaster of Post Office where employee worked to determine whether plaintiff could perform essential functions of job and to Postmaster's supervisor who was to review Postmaster's decision), aff'd, 79 F.3d 1145 (5th Cir. 1996) (unpublished table decision); McNeill v. IRS, No. 93-2204, slip op. at 5-6 (D.D.C. Feb. 7, 1995) (disclosures made to Treasury Department's Equal Employment Opportunity (EEO) personnel in course of their investigation of EEO allegations initiated by plaintiff); Harry v. United States Postal Serv., 867 F. Supp. 1199, 1206 (M.D. Pa. 1994) (disclosure from one internal subdivision of Postal Service to another--the Inspection Service (Inspector General)--which was conducting an investigation); Hass v. United States Air Force, 848 F. Supp. 926, 932 (D. Kan. 1994) (disclosure of mental health evaluation to officers who ultimately made decision to revoke plaintiff's security clearance and discharge her); Lachenmyer v. Frank, No. 88-2414, slip op. at 3-4 (C.D. Ill. July 16, 1990) (disclosure of investigative report, referencing employee's admission that he had been treated for alcohol abuse, to supervisor); Williams v. Reilly, 743 F. Supp. 168, 175 (S.D.N.Y. 1990) (admission of drug use disclosed by the Naval Investigative Service to plaintiff's employer, the Defense Logistics Agency); Bengle v. Reilly, No. 88-587, slip op. at 16 (D.D.C. Feb. 28, 1990) (disclosure to personnel consulted by employee's supervisors in order to address employee's complaints); Glass v. United States Dep't of Energy, No. 87-2205, slip op. at 2 (D.D.C. Oct. 29, 1988) (disclosure to "officials or counsel for the agency for use in the exercise of their responsibility for management of the agency or for defense of litigation initiat-

ed by plaintiff"); Krowitz v. USDA, 641 F. Supp. 1536, 1545-46 (W.D. Mich. 1986) (details of employee's performance status disclosed to other personnel who were assigned to assist plaintiff), aff'd, 826 F.2d 1063 (6th Cir. 1987) (unpublished table decision); Marcotte v. Secretary of Defense, 618 F. Supp. 756, 763 (D. Kan. 1985) (disclosure of "talking paper" chronicling officer's attempts to correct effectiveness ratings to Inspector General for purpose of responding to officer's challenge to "staff advisories"); Nutter v. VA, No. 84-2392, slip op. at 8-9 (D.D.C. July 9, 1985) (disclosure of record reflecting employee's impending indictment to personnel responsible for responding to public and press inquiries); Brooks v. Grinstead, 3 Gov't Disclosure Serv. (P-H) ¶ 83,054, at 83,551-53 (E.D. Pa. Dec. 12, 1982) (disclosure of employee's security file to supervisor for purpose of ascertaining employee's trustworthiness); Carin v. United States, 1 Gov't Disclosure Serv. (P-H) ¶ 80,193, at 80,492 & n.1 (D.D.C. Aug. 5, 1980) (disclosure of employee's EEO complaint to other employees during grievance process); Lydia R. v. United States Army, No. 78-069, slip op. at 3-6 (D.S.C. Feb. 28, 1979) (disclosure of derogatory information from employee's file to officer for purpose of determining appropriateness of assigning employee to particular position).

Although subsection (b)(1) permits disclosure only to "those officers and employees of the agency which maintains the record," two courts have upheld a disclosure to a contractor who serves the function of an agency employee. See Coakley v. United States Dep't of Transp., No. 93-1420, slip op. at 3 (D.D.C. Apr. 7, 1994) (holding that EEO investigator who was independent contractor "must be considered an employee of DOT for Privacy Act purposes" and that disclosure of information by former Department employee to contractor, "[g]iven that the disclosure in question occurred in connection with an official agency investigation . . . must be considered an intra-agency communication under the Act"); Hulett v. Department of the Navy, No. TH 85-310-C, slip op. at 3-4 (S.D. Ind. Oct. 26, 1987) (release of medical and personnel records to contractor/psychiatrist for purpose of assisting him in performing "fitness for duty" examination), aff'd, 866 F.2d 432 (7th Cir. 1988) (unpublished table decision). Another court, however, has held to the contrary on facts nearly identical to those in Hulett. Taylor v. Orr, No. 83-0389, slip op. at 6-8 (D.D.C. Dec. 5, 1983).

OMB has informally advised agencies that, consistent with Taylor v. Orr, a subsection (m) contractor is not an "employee" for purposes of subsection (b)(1). (Subsection (m) of the Privacy Act is discussed further under "Government Contractors," below.) However, the OMB Guidelines note that "movement of records between personnel of different agencies may in some instances be viewed as intra-agency disclosures if that movement is in connection with an inter-agency support agreement." OMB Guidelines, 40 Fed. Reg. at 28,954.

2. 5 U.S.C. § 552a(b)(2) (required FOIA disclosure)

"required under section 552 of this title."

comment -- The point of this exception is that the Privacy Act never prohibits a disclosure that the Freedom of Information Act actually requires. See Greentree v. United States Customs Serv., 674 F.2d 74, 79 (D.C. Cir. 1982) (subsection (b)(2) "represents a Congressional mandate that the Privacy Act not be used as a barrier to FOIA access").

Thus, if an agency is in receipt of a FOIA request for information about an individual that is contained in a system of records and that is not properly withholdable under any FOIA exemption, then it follows that the agency is "required under Section 552 of this title" to disclose the information to the FOIA requester. This would be a permissible subsection (b)(2) disclosure. However, if a FOIA exemption--typically, Exemption 6 or Exemption 7(C)--applies to a Privacy Act-protected record, the Privacy Act prohibits an agency from making a "discretionary" FOIA release because that disclosure would not be "required" by the FOIA within the meaning of subsection (b)(2). See, e.g., DOD v. FLRA, 510 U.S. 487, 502 (1994); United States Dep't of the Navy v. FLRA, 975 F.2d 348, 354-56 (7th Cir. 1992); DOD v. FLRA, 964 F.2d 26, 30 n.6 (D.C. Cir. 1992); Andrews v. VA, 838 F.2d 418, 422-24 & n.8 (10th Cir. 1988); Robbins v. HHS, No. 1:95-cv-3258, slip op. at 2-9 (N.D. Ga. Aug. 13, 1996), aff'd, No. 96-9000 (11th Cir. July 8, 1997); Kassel v. VA, 709 F. Supp. 1194, 1199-1200 (D.N.H. 1989); Howard v. Marsh, 654 F. Supp. 853, 855-56 (E.D. Mo. 1986); Florida Med. Ass'n v. HEW, 479 F. Supp. 1291, 1305-07 (M.D. Fla. 1979); Providence Journal Co. v. FBI, 460 F. Supp. 762, 767 (D.R.I. 1978), rev'd on other grounds, 602 F.2d 1010 (1st Cir. 1979); Philadelphia Newspapers, Inc. v. United States Dep't of Justice, 405 F. Supp. 8, 10 (E.D. Pa. 1975);

see also OMB Guidelines, 40 Fed. Reg. 28,948, 28,954 (1975).

In United States Department of Justice v. Reporters Committee for Freedom of the Press, 489 U.S. 749, 762-75 (1989), the Supreme Court significantly expanded the breadths of FOIA Exemptions 6 and 7(C). The Court ruled that a privacy interest may exist in publicly available information--such as the criminal history records (rap sheets) there at issue--where the information is "practically obscure." Id. at 764-71. Even more significantly, the Court held that the identity of the FOIA requester, and any socially useful purpose for which the request was made, are not to be considered in evaluating whether the "public interest" would be served by disclosure. Id. at 771-75. The Court determined that the magnitude of the public interest side of the balancing process can be assessed only by reference to whether disclosure of the requested records directly advances the "core purpose" of the FOIA--to shed light on the operations and activities of the government. Id. at 774-75.

In light of Reporters Committee, personal information of the sort protected by the Privacy Act is less likely to be "required" to be disclosed under the FOIA, within the meaning of subsection (b)(2). Specifically, where an agency determines that the only "public interest" that would be furthered by a disclosure is a nonqualifying one under Reporters Committee (even where it believes that disclosure would be in furtherance of good public policy generally), it no longer may balance in favor of disclosure under the FOIA and therefore disclosure will be prohibited under the Privacy Act--unless authorized by another Privacy Act exception or by written consent. See, e.g., DOD v. FLRA, 510 U.S. at 497-502 (declining to "import the policy considerations that are made explicit in the Labor Statute into the FOIA Exemption 6 balancing analysis" and, following the principles of Reporters Committee, holding that home addresses of bargaining unit employees are covered by FOIA Exemption 6 and thus that Privacy Act "prohibits their release to the unions"); Schwarz v. Interpol, No. 94-4111, 1995 U.S. App. LEXIS 3987, at **4-7 & n.2 (10th Cir. Feb. 28, 1995) (balancing under Reporters Committee and holding that individual clearly has protected privacy interest in avoiding disclosure of his whereabouts to third parties; disclosure of this information would not "contribute anything to the public's understanding of the operations or

activities of the government"; and thus any information was exempt from disclosure under FOIA Exemption 7(C) and does not fall within Privacy Act exception (b)(2)); FLRA v. United States Dep't of Commerce, 962 F.2d 1055, 1059 (D.C. Cir. 1992) (Privacy Act prohibits disclosure of identities of individuals who received outstanding or commendable personnel evaluations, as such information falls within FOIA Exemption 6); see also FOIA Update, Spring 1989, at 6. As a result of Reporters Committee, it is understandable that agencies are depending more on the subsection (b)(3) routine use exception to disclose records which are no longer required by the FOIA to be disclosed. See, e.g., USDA v. FLRA, 876 F.2d 50, 51 (8th Cir. 1989); see also FLRA v. United States Dep't of the Treasury, 884 F.2d 1446, 1450 & n.2 (D.C. Cir. 1989).

The Court of Appeals for the District of Columbia Circuit significantly limited the utility of subsection (b)(2) in Bartel v. FAA, 725 F.2d 1402 (D.C. Cir. 1984). In Bartel, the D.C. Circuit held that subsection (b)(2) cannot be invoked unless an agency actually has a FOIA request in hand. 725 F.2d at 1411-13. The D.C. Circuit's approach in Bartel has not been taken by other courts. See Cochran v. United States, 770 F.2d 949, 957-58 & n.14 (11th Cir. 1985) (applying subsection (b)(2)--in absence of written FOIA request--because requested records would not be withholdable under any FOIA exemption); Jafari v. Department of the Navy, 728 F.2d 247, 249-50 (4th Cir. 1984) (same); see also Florida Med. Ass'n, 479 F. Supp. at 1301, 1305-07. However, because the D.C. Circuit is the jurisdiction of "universal venue" under the Privacy Act (which means that any Privacy Act lawsuit for wrongful disclosure could be filed within that judicial circuit), see 5 U.S.C. § 552a(g)(5), its holding in Bartel is of paramount importance. See FOIA Update, Summer 1984, at 2.

Note, though, that the Bartel decision left open the possibility that certain types of information "traditionally released by an agency to the public" might properly be disclosed even in the absence of an actual FOIA request. 725 F.2d at 1413 (dictum). Reacting to Bartel, OMB issued guidance indicating that records which have "traditionally" been considered to be in the public domain, and those that are required to be disclosed to the public--such as final opinions of agencies and press releases--can be released without waiting for an actual FOIA request. OMB Guidelines, 52 Fed. Reg. 12,990, 12,992-

93 (1987) (discussing Bartel, in context of guidance on "call detail" programs, and referring to OMB Memorandum For The Senior Agency Officials For Information Resources Management (May 24, 1985) at 4-6 (unpublished)). At least one pre-Bartel case appears to support this idea. Owens v. MSPB, No. 3-83-0449-R, slip op. at 3 (N.D. Tex. Sept. 14, 1983) (release of agency's final decision is public information that "simply cannot be an unlawful disclosure under the Privacy Act"). But see Zeller v. United States, 467 F. Supp. 487, 503 (E.D.N.Y. 1979) (subsection (b)(2) inapplicable to press release as "nothing in the FOIA appears to require such information to be released in the absence of a request therefor").

3. 5 U.S.C. § 552a(b)(3) (routine uses)

"for a routine use as defined in subsection (a)(7) of this section and described under subsection (e)(4)(D)."

Cross-references:

Subsection (e)(4)(D) requires Federal Register publication of "each routine use of the records contained in the system, including the categories of users and the purpose of such use."

Subsection (a)(7) defines the term "routine use" to mean "with respect to the disclosure of a record, the use of such record for a purpose which is compatible with the purpose for which it was collected."

comment -- The routine use exception, because of its potential breadth, is one of the most controversial provisions in the Act. See Privacy Commission Report at 517-18. The trend in recent cases is toward a narrower construction of the exception.

By its terms, this exception sets forth two requirements for a proper routine use disclosure: (1) Federal Register publication, thereby providing constructive notice; and (2) compatibility. See Britt v. Naval Investigative Serv., 886 F.2d 544, 547-50 (3d Cir. 1989); Shannon v. General Elec. Co., 812 F. Supp. 308, 316 (N.D.N.Y. 1993).

However, the Court of Appeals for the Ninth Circuit has engrafted a third requirement onto this exception: Actual notice of the routine use under subsection (e)(3)(C) (i.e., at the time of information collection from the individual). Covert v. Harrington, 876 F.2d 751, 754-56 (9th Cir. 1989) (discussed below). Subsequently, the Court of Appeals for the District of Columbia Circuit cited this aspect of Covert with approval

and remanded a case for determination as to whether (e)(3)(C) notice was provided, stating that "[a]lthough the statute itself does not provide, in so many terms, that an agency's failure to provide employees with actual notice of its routine uses would prevent a disclosure from qualifying as a `routine use,' that conclusion seems implicit in the structure and purpose of the Act." United States Postal Serv. v. National Ass'n of Letter Carriers, 9 F.3d 138, 146 (D.C. Cir. 1993).

Federal Register Constructive Notice

The routine use exception's notice requirement "is intended to serve as a caution to agencies to think out in advance what uses [they] will make of information." 120 Cong. Rec. 40,881 (1974), reprinted in Source Book at 987. Indeed, it is possible for a routine use to be deemed facially invalid if it fails to satisfy subsection (e)(4)(D)--i.e., if it does not specify "the categories of users and the purpose of such use." See Britt, 886 F.2d at 547-48 (dictum) (suggesting that routine use (50 Fed. Reg. 22,802-03 (1985)) permitting disclosure to "federal regulatory agencies with investigative units" is overbroad as it "does not provide adequate notice to individuals as to what information concerning them will be released and the purposes of such release"); cf. Krohn v. United States Dep't of Justice, No. 78-1536, slip op. at 4-7 (D.D.C. Mar. 19, 1984) ("to qualify as a `routine use,' the agency must . . . publish in the Federal Register . . . `each routine use of the records contained in the system, including the categories of users and the purpose of such use"), reconsideration granted & vacated in nonpertinent part (D.D.C. Nov. 29, 1984) (discussed below).

It is well settled that the "scope of [a] routine use is confined to the published definition." Doe v. Naval Air Station, Pensacola, Fla., 768 F.2d 1229, 1231 (11th Cir. 1985); see also Parks v. IRS, 618 F.2d 677, 681-82 (10th Cir. 1980); Quilico v. United States Navy, No. 80-C-3568, slip op. at 8-9 (N.D. Ill. Sept. 2, 1983); Local 2047, Am. Fed'n of Gov't Employees v. Defense Gen. Supply Ctr., 423 F. Supp. 481, 484-86 (E.D. Va. 1976), aff'd, 573 F.2d 184 (4th Cir. 1978). In other words, a particular disclosure is unauthorized if it does not fall within the clear terms of the routine use. See, e.g., Swenson v. United States Postal Serv., 890 F.2d 1075, 1078 (9th Cir. 1989) (47 Fed. Reg. 1203 (1982) held inapplicable to agency's disclosure of

record referencing employee's EEO complaints to her congressmen as their inquiries were not "made at the request of" employee); Tijerina v. Walters, 821 F.2d 789, 798 (D.C. Cir. 1987) (47 Fed. Reg. 24,012 (1982) held inapplicable to VA's unsolicited letter notifying state board of bar examiners of possible fraud committed by bar applicant because no violation of state law was "reasonably imminent," and letter was not in response to "official request"); Doe v. DiGenova, 779 F.2d 74, 86 (D.C. Cir. 1985) (43 Fed. Reg. 44,743 (1978) held inapplicable to VA psychiatric report because disclosed record itself did not "indicate a potential violation of law"); Greene v. VA, No. C-76-461-S, slip op. at 3-6 (M.D.N.C. July 3, 1978) (40 Fed. Reg. 38,105 (1975) held inapplicable to VA's disclosure of medical evaluation to state licensing bureau because routine use permitted disclosure only to facilitate VA decision); see also Covert, 667 F. Supp. at 736-39 (discussed below).

Note that an agency's construction of its routine use should be entitled to deference. See Department of the Air Force, Scott Air Force Base, Illinois v. FLRA, 104 F.3d 1396, 1402 (D.C. Cir. 1997); FLRA v. United States Dep't of the Treasury, 884 F.2d 1446, 1455-56 (D.C. Cir. 1989). But see NLRB v. United States Postal Serv., 790 F. Supp. 31, 33 (D.D.C. 1992) (rejecting Postal Service's interpretation of its own routine use).

Compatibility

The precise meaning of the term "compatible" is quite uncertain and must be assessed on a case-by-case basis. According to OMB, the "compatibility" concept encompasses (1) functionally equivalent uses, and (2) other uses that are necessary and proper. OMB Guidelines, 52 Fed. Reg. 12,990, 12,993 (1987).

The leading case on "compatibility" is Britt v. Naval Investigative Serv., 886 F.2d at 547-50, in which the Court of Appeals for the Third Circuit ruled that the Naval Investigative Service's gratuitous disclosure of records, describing a then-pending criminal investigation of a Marine Corps reservist, to that individual's civilian employer (the Immigration and Naturalization Service), was not "compatible" with the "case-specific purpose for collecting" such records. Id. In holding that the employment/suitability purpose for disclosure was incompatible with the criminal law enforcement purpose for collection, the Third Cir-

cuit deemed it significant that "the [Immigration and Naturalization Service] was not conducting its own criminal investigation of the same activity or any other activity" by the subject, and that the records at issue concerned "merely a preliminary investigation with no inculpatory findings." Id. at 549-50. Employing especially broad language, the Third Circuit pointedly condemned the agency's equating of "compatibility" with mere "relevance" to the recipient entity, observing that "[t]here must be a more concrete relationship or similarity, some meaningful degree of convergence, between the disclosing agency's purpose in gathering the information and in its disclosure." Id. (citing Covert, 876 F.2d at 755 (dictum); Mazaleski v. Truesdale, 562 F.2d 701, 713 n.31 (D.C. Cir. 1977) (dictum)); accord Swenson, 890 F.2d at 1078; cf. Quinn v. Stone, 978 F.2d 126, 139 (3d Cir. 1992) (Nygaard, J., dissenting) (concluding that disclosure was authorized by routine use because disclosure was compatible with one of the purposes for collection, even if not with main purpose for collection).

More recently, the D.C. Circuit interpreted the term "compatibility" in considering a routine use providing for disclosure to labor organizations as part of the collective bargaining process. The court stated that application of the "common usage" of the word would require simply that "a proposed disclosure would not actually frustrate the purposes for which the information was gathered." United States Postal Serv. v. National Ass'n of Letter Carriers, 9 F.3d 138, 144 (D.C. Cir. 1993). The D.C. Circuit recognized the "far tighter nexus" that was required by the Third and Ninth Circuits in Britt and Swenson, and that is consistent with the legislative history, but stated:

> Whatever the merit of the decisions of prior courts that have held . . . that a finding of a substantial similarity of purpose might be appropriate in the non-labor law context in order to effectuate congressional intent, the compatibility requirement imposed by section 552a(a)(7) cannot be understood to prevent an agency from disclosing to a union information as part of the collective bargaining process.

Id. at 145. In a concurring opinion, Judge Williams agreed with the disposition of the case, but noted that he did not share the "belief that the meaning of `compatible'

. . . may depend on the identity of the entity to which the information is being disclosed." Id. at 147 n.1 (Williams, J., concurring). Rather, seeing "no conflict between the purposes for which the information was collected and those for which it will be disclosed," he found the disclosure compatible without further inquiry. Id. at 146-47.

There are two examples of "compatible" routine uses that frequently occur in the law enforcement context. First, in the context of investigations/prosecutions, law enforcement agencies may routinely share law enforcement records with each other. See OMB Guidelines, 40 Fed. Reg. at 28,955 (proper routine use is "transfer by a law enforcement agency of protective intelligence information to the Secret Service"); see also 28 U.S.C. § 534 (1994) (authorizing Attorney General to exchange criminal records with "authorized officials of the Federal Government, the States, cities, and penal and other institutions"). Second, agencies may routinely disclose any records indicating a possible violation of law (regardless of the purpose for collection) to law enforcement agencies for purposes of investigation/prosecution. See OMB Guidelines, 40 Fed. Reg. at 28,953; 120 Cong. Rec. 36,967, 40,884 (1974), reprinted in Source Book at 957-58, 995 (remarks of Congressman Moorhead); see also 28 U.S.C. § 535(b) (1994) (requiring agencies of the executive branch to expeditiously report "[a]ny information, allegation, or complaint" relating to crimes involving government officers and employees to United States Attorney General). These kinds of routine uses have been criticized on the ground that they circumvent the more restrictive requirements of subsection (b)(7). See Privacy Commission Report at 517-18; see also Britt, 886 F.2d at 548 n.1 (dictum); Covert, 667 F. Supp. at 739, 742 (dictum). Yet, they have never been successfully challenged on that basis. Cf. Nwangoro v. Department of the Army, 952 F. Supp. 394, 398 (N.D. Tex. 1996) (disclosure by Military Police of financial records obtained in ongoing criminal investigation to foreign customs officials likewise involved in investigation of possible infractions of foreign tax and customs laws was "permitted by the `routine use' exception and d[id] not constitute a violation of the Privacy Act"); Little v. FBI, 793 F. Supp. 652, 655 (D. Md. 1992) (disclosure did not violate Privacy Act prohibition because it was made pursuant to routine use that allows disclosure of personnel matters to other government agencies when directly related to enforcement

function of recipient agency), aff'd on other grounds, 1 F.3d 255 (4th Cir. 1993).

In Covert v. Harrington, 667 F. Supp. at 736-39, however, the district court held that 47 Fed. Reg. 14,333 (1982)--a routine use permitting the Department of Energy's Inspector General to disclose to the Justice Department relevant records when "a record" indicates a potential violation of law--did not permit the disclosure of personnel security questionnaires submitted by the plaintiffs because such questionnaires did not on their face reveal potential violations of law. The court rejected the agency's argument that disclosure was proper because each questionnaire was disclosed as part of a prosecutive report that (when viewed as a whole) did reveal a potential violation of law. Id. at 736-37. Further, the court found that the Inspector General's disclosure of the questionnaires to the Justice Department (for a criminal fraud prosecution) was not compatible with the purpose for which they were originally collected by the Department of Energy (for a security-clearance eligibility determination), notwithstanding the fact that the questionnaires were subsequently acquired by the Inspector General--on an intra-agency "need to know" basis pursuant to 5 U.S.C. § 552a(b)(1)--for the purpose of a fraud investigation. Id. at 737-39.

On cross-appeals, a divided panel of the Court of Appeals for the Ninth Circuit affirmed the district court's judgment on other grounds. Covert, 876 F.2d at 754-56. The panel majority held that the Department of Energy's failure to provide actual notice of the routine use on the questionnaires at the time of original collection, under subsection (e)(3)(C), precluded the Department of Energy from later invoking that routine use under subsection (b)(3). Id. at 755-56; see also United States Postal Serv. v. National Ass'n of Letter Carriers, 9 F.3d at 146 (citing Covert with approval and remanding case for factual determination as to whether (e)(3)(C) notice was given). No other court had ever so held. See additional discussion under subsection (e)(3) below.

In Doe v. Stephens, 851 F.2d 1457, 1465-67 (D.C. Cir. 1988), the Court of Appeals for the District of Columbia Circuit held that a VA routine use--permitting disclosure of records "in order for the VA to respond to and comply with the issuance of a federal subpoena [47 Fed. Reg. 51,841 (1982)]"--was invalid under the Administrative Procedure Act because it was inconsistent with the

Privacy Act as interpreted in Doe v. DiGenova, 779 F.2d at 78-84--where the court had found that disclosures pursuant to subpoenas were not permitted by the subsection (b)(11) court order exception. In light of Doe v. Stephens, the decision in Fields v. Leuver, No. 83-0967, slip op. at 5-7 (D.D.C. Sept. 22, 1983) (upholding routine use permitting disclosure of payroll records "in response to a court subpoena"), is unreliable. But cf. Osborne v. United States Postal Serv., No. 94-30353, slip op. at 6-9 (N.D. Fla. May 18, 1995) (holding on alternative ground that disclosure of plaintiff's injury-compensation file to retired employee who had prepared file and who had been subpoenaed by plaintiff and was expecting to be deposed on matters documented in file was proper pursuant to routine use that "`specifically contemplates that information may be released in response to relevant discovery and that any manner of response allowed by the rules of the forum may be employed'").

A particular area of controversy concerns whether the routine use exception can be invoked to publicly file records in court. The Act's legislative history recognizes the "compatibility" of this type of disclosure. See 120 Cong. Rec. 40,405, 40,884 (1974), reprinted in Source Book at 858, 995 (routine use appropriate where Justice Department "presents evidence [tax information from IRS] against the individual" in court); see also Schuenemeyer v. United States, No. SA-85-773, slip op. at 4 (W.D. Tex. Mar. 31, 1988) (permitting disclosure of litigant's medical records to Justice Department and U.S. Claims Court for use "in preparing the position of the USAF before the [court]"). In Krohn, No. 78-1536, slip op. at 4-7 (D.D.C. Mar. 19, 1984), however, the court invalidated an FBI routine use allowing for "dissemination [of records] during appropriate legal proceedings," finding that such a routine use was impermissibly "vague" and was "capable of being construed so broadly as to encompass all legal proceedings." In response to Krohn, OMB issued guidance to agencies in which it suggested a model routine use--employing a "relevant and necessary to the litigation" standard--to permit the public filing of protected records with a court. OMB Memorandum For The Senior Agency Officials For Information Resources Management (May 24, 1985) at 2-4 (unpublished). Many agencies, including the Justice Department, have adopted "post-Krohn" routine uses designed to authorize the public filing of relevant records in court. See, e.g., 53 Fed. Reg. 40,504, 40,505 (1988) (routine use [number 7] applicable to

records in Justice Department's "Civil Division Case File System"); 53 Fed. Reg. 1864, 1865 (1988) (routine uses [letters "o" and "p"] applicable to records in U.S. Attorney's Office's "Civil Case Files").

It should be noted that none of the "post-Krohn" routine uses--such as the ones cited above which employ an "arguably relevant to the litigation" standard--have yet been successfully challenged in the courts. Cf. Russell v. GSA, 935 F. Supp. 1142, 1145-46 (D. Colo. 1996) (without analyzing propriety of routine use, finding disclosure in public pleadings of information regarding investigation of plaintiff was permissible under routine use providing for disclosure in proceeding before court where agency is party and records are determined "to be arguably relevant to the litigation"); Osborne, No. 94-30353, slip op. at 6-9 (N.D. Fla. May 18, 1995) (holding on alternative ground that disclosure of plaintiff's injury-compensation file to retired employee who had prepared file and who had been subpoenaed by plaintiff and was expecting to be deposed on matters documented in file was proper pursuant to routine use providing for disclosures "incident to litigation" and "in a proceeding before a court" because "deposition was a proceeding before [the] Court"); Sheptin v. United States Dep't of Justice, No. 91-2806, slip op. at 6-7 (D.D.C. Apr. 30, 1992) (no wrongful disclosure where agency routine uses permit use of presentence report during course of habeas proceeding). Such challenges may be expected, either based upon an argument that the routine use does not satisfy the "compatibility" requirement of subsection (a)(7) of the Act, cf. Britt, 886 F.2d at 547-50 (mere "relevance" to recipient entity held to be improper standard for a "compatible" routine use disclosure), or based upon an argument that the routine use effectively circumvents the more restrictive, privacy-protective requirements of subsection (b)(11), cf. Doe v. Stephens, 851 F.2d at 1465-67 (agency cannot use routine use exception to disclose records in response to subpoena where court had earlier ruled that such disclosure was improper under subsection (b)(11)).

Numerous types of sharing of information between agencies and with organizations or individuals have been upheld as valid routine uses. See, e.g., Taylor v. United States, 106 F.3d 833, 836-37 (8th Cir. 1997) (disclosure of federal taxpayer information collected for purpose of federal tax administration to state tax officials for purpose of state tax administration), aff'g

Taylor v. IRS, 186 B.R. 441, 446-47, 453-54 (N.D. Iowa 1995); Mount v. United States Postal Serv., 79 F.3d 531, 534 (6th Cir. 1996) (disclosure of plaintiff's medical information to union official representing him in administrative action in which his mental health was central issue); Alphin v. FAA, No. 89-2405, slip op. at 4-5 (4th Cir. Apr. 13, 1990) (disclosure of enforcement investigation final report to subject's customers); Hastings v. Judicial Conference of the United States, 770 F.2d 1093, 1104 (D.C. Cir. 1985) (disclosure of criminal investigative records to judicial committee investigating judge); United States v. Miller, 643 F.2d 713, 715 (10th Cir. 1981) (records submitted by individual to parole officer became part of Justice Department files and Department's use in criminal investigation constitutes routine use); United States v. Collins, 596 F.2d 166, 168 (6th Cir. 1979) (HEW's disclosure of plaintiff's Medicaid cost reports to Justice Department for use in criminal case against plaintiff); Magee v. United States Postal Serv., 903 F. Supp. 1022, 1029 (W.D. La. 1995) (disclosure of employee's medical records to clinical psychologist hired by agency to perform fitness-for-duty examination on employee), aff'd, 79 F.3d 1145 (5th Cir. 1996) (unpublished table decision); McNeill v. IRS, No. 93-2204, slip op. at 4-5 (D.D.C. Feb. 7, 1995) (disclosure of IRS personnel records to prospective federal agency employer); Harry v. United States Postal Serv., 867 F. Supp. 1199, 1206-07 (M.D. Pa. 1994) (disclosure of documents regarding individual's employment history, including details of settlement agreement, in response to congressional inquiries "made at the prompting of that individual"); Lachenmyer v. Frank, No. 88-2414, slip op. at 4 (C.D. Ill. July 16, 1990) (disclosure of investigative report to persons at arbitration hearing held proper under routine use permitting disclosure of "record relating to a case or matter" in a "hearing in accordance with the procedures governing such proceeding or hearing"); Choe v. Smith, No. C-87-1764R, slip op. at 10-11 (W.D. Wash. Apr. 20, 1989) (INS's disclosure to its informant during investigation "to elicit information required by the Service to carry out its functions and statutory mandates"), aff'd, 935 F.2d 274 (9th Cir. 1991) (unpublished table decision); Brown v. FBI, No. 87-C-9982, slip op. at 2 (N.D. Ill. July 25, 1988) (disclosure of rap sheet to local police department); Ely v. Department of Justice, 610 F. Supp. 942, 945-46 (N.D. Ill. 1985) (disclosure to plaintiff's lawyer), aff'd, 792 F.2d 142 (7th Cir. 1986) (unpub-

lished table decision); Kimberlin v. United States Dep't of Justice, 605 F. Supp. 79, 82-83 (N.D. Ill. 1985) (Bureau of Prisons' disclosure of prisoner's commissary account record to probation officer), aff'd, 788 F.2d 434 (7th Cir. 1986); Burley v. DEA, 443 F. Supp. 619, 623-24 (M.D. Tenn. 1977) (transmittal of DEA records to state pharmacy board); Harper v. United States, 423 F. Supp. 192, 198-99 (D.S.C. 1976) (IRS's disclosure of plaintiff's identity to other targets of investigation).

Four courts have required an agency to invoke its routine use to permit disclosure to unions of names of employees on the theory that refusal to so disclose was an unfair labor practice under the National Labor Relations Act. See NLRB v. United States Postal Serv., No. 92-2358, slip op. at 6-7 (4th Cir. Feb. 16, 1994); NLRB v. United States Postal Serv., 888 F.2d 1568, 1572-73 (11th Cir. 1989); NLRB v. United States Postal Serv., 841 F.2d 141, 144-45 & n.3 (6th Cir. 1988); NLRB v. United States Postal Serv., 790 F. Supp. 31, 33 (D.D.C. 1992); see also United States Postal Serv. v. National Ass'n of Letter Carriers, 9 F.3d 138, 141-46 (D.C. Cir. 1993) (holding that "if Postal Service could disclose the information under [its routine use] then it must disclose that information, because in the absence of a Privacy Act defense the arbitrator's award must be enforced," but remanding case for determination as to whether proper (e)(3)(C) notice was given before requiring invocation of routine use); FLRA v. United States Dep't of the Navy, 966 F.2d 747, 761-65 (3d Cir. 1992) (alternative holding) (en banc) (release to union of home addresses of bargaining unit employees pursuant to routine use was required under Federal Service Labor-Management Relations Act).

In addition, the Court of Appeals for the District of Columbia Circuit, in Department of the Air Force v. FLRA, granted enforcement of a Federal Labor Relations Authority decision requiring the Air Force to disclose to a union a disciplinary letter that was issued to a bargaining unit employee's supervisor. 104 F.3d 1396, 1399, 1401-02 (D.C. Cir. 1997). The court held that the Federal Management Relations Statute required disclosure of the letter, and that because the "union's request f[ell] within the Act's `routine use' exception, the Privacy Act d[id] not bar disclosure," and the union was entitled to disclosure of the letter. Id. at 1401-02.

Apart from the FOIA (see subsection (b)(2)) and the Debt Collection Act (see subsection (b)(12)), the Privacy Act makes no provision for any nonconsensual disclosures that are provided for by other statutes. See, e.g., 42 U.S.C. § 653 (1994 & Supp. I 1995) (establishing "Parent Locator Service" and requiring agencies to comply with requests from Secretary of HHS for addresses and places of employment of absent parents "[n]otwithstanding any other provision of law"). Recognizing this difficulty, the OMB Guidelines note that "[s]uch disclosures, which are in effect congressionally mandated `routine uses,' should still be established as `routine uses' pursuant to subsections (e)(11) and (e)(4)(D)." OMB Guidelines, 40 Fed. Reg. at 28,954.

4. 5 U.S.C. § 552a(b)(4) (Bureau of the Census)

"to the Bureau of the Census for purposes of planning or carrying out a census or survey or related activity pursuant to the provisions of Title 13."

comment -- For a discussion of this provision, see OMB Guidelines, 40 Fed. Reg. 28,948, 28,954 (1975).

5. 5 U.S.C. § 552a(b)(5) (statistical research)

"to a recipient who has provided the agency with advance adequate written assurance that the record will be used solely as a statistical research or reporting record, and the record is to be transferred in a form that is not individually identifiable."

comment -- The term "statistical record" is defined in the Act as a record that is not used in making individual determinations. 5 U.S.C. § 552a(a)(6). One might question whether this exception to subsection (b) is anomalous: The information it permits to be released is arguably not a "record," see 5 U.S.C. § 552a(a)(4), or a "disclosure," see 5 U.S.C. § 552a(b), in the first place as it is not identifiable to any individual. However, the OMB Guidelines provide a plausible explanation for this unique provision: "One may infer from the legislative history and other portions of the Act that an objective of this provision is to reduce the possibility of matching and analysis of statistical records with other records to reconstruct individually identifiable records." OMB Guidelines, 40 Fed. Reg. 28,948, 28,954 (1975).

6. 5 U.S.C. § 552a(b)(6) (National Archives)

"to the National Archives and Records Administration as a record which has sufficient historical or other value

to warrant its continued preservation by the United States Government, or for evaluation by the Archivist of the United States or the designee of the Archivist to determine whether the record has such value."

comment -- For a discussion of this provision, see OMB Guidelines, 40 Fed. Reg. 28,948, 28,955 (1975).

7. 5 U.S.C. § 552a(b)(7) (law enforcement request)

"to another agency or to an instrumentality of any governmental jurisdiction within or under the control of the United States for a civil or criminal law enforcement activity if the activity is authorized by law, and if the head of the agency or instrumentality has made a written request to the agency which maintains the record specifying the particular portion desired and the law enforcement activity for which the record is sought."

comment -- This provision, in addition to providing for disclosures to federal law enforcement agencies, also allows an agency, "upon receipt of a written request, [to] disclose a record to another agency or unit of State or local government for a civil or criminal law enforcement activity." OMB Guidelines, 40 Fed. Reg. 28,948, 28,955 (1975).

Note that the request must be submitted in writing and must be from the head of the agency or instrumentality. See Doe v. DiGenova, 779 F.2d 74, 85 (D.C. Cir. 1985); Doe v. Naval Air Station, 768 F.2d 1229, 1232-33 (11th Cir. 1985); see also Reyes v. Supervisor of DEA, 834 F.2d 1093, 1095 (1st Cir. 1987); United States v. Collins, 596 F.2d 166, 168 (6th Cir. 1979); SEC v. Dimensional Entertainment Corp., 518 F. Supp. 773, 775 (S.D.N.Y. 1981).

Record-requesting authority may be delegated down to lower-level agency officials when necessary, but not below the "section chief" level. See OMB Guidelines, 40 Fed. Reg. at 28,955; see also 120 Cong. Rec. 36,967 (1974), reprinted in Source Book at 958. The Department of Justice has delegated record-requesting authority to a "head of a component or a United States Attorney, or either's designee." See Revised Department of Justice Freedom of Information Act and Privacy Act Regulations, 62 Fed. Reg. 45,184, 45,192 (1997) (to be codified at 28 C.F.R. pt. 16) (proposed August 26, 1997).

8. 5 U.S.C. § 552a(b)(8) (health or safety of an individual)

"to a person pursuant to a showing of compelling circumstances affecting the health or safety of an indi-

vidual if upon such disclosure notification is transmitted to the last known address of such individual."

comment -- For cases discussing this provision, see Schwarz v. Interpol, No. 94-4111, 1995 U.S. App. LEXIS 3987, at *6 n.2 (10th Cir. Feb. 28, 1995) (unsubstantiated allegations alone do not constitute "showing of compelling circumstances"), and DePlanche v. Califano, 549 F. Supp. 685, 703-04 (W.D. Mich. 1982) (emphasizing emergency nature of exception). According to the OMB Guidelines, the individual about whom records are disclosed "need not necessarily be the individual whose health or safety is at peril; e.g., release of dental records on several individuals in order to identify an individual who was injured in an accident." OMB Guidelines, 40 Fed. Reg. 28,948, 28,955 (1975). This construction, while certainly sensible as a policy matter, appears to conflict with the actual wording of subsection (b)(8).

9. 5 U.S.C. § 552a(b)(9) (Congress)

"to either House of Congress, or, to the extent of matter within its jurisdiction, any committee or subcommittee thereof, any joint committee of Congress or subcommittee of any such joint committee."

comment -- This exception does not authorize the disclosure of a Privacy Act-protected record to an individual Member of Congress acting on his or her own behalf or on behalf of a constituent. See OMB Guidelines, 40 Fed. Reg. 28,948, 28,955 (1975); 40 Fed. Reg. 56,741, 56,742 (1975); see also Swenson v. United States Postal Serv., 890 F.2d 1075, 1077 (9th Cir. 1989); Lee v. Dearment, No. 91-2175, slip op. at 5 (4th Cir. June 3, 1992); cf. FOIA Update, Winter 1984, at 3-4 (interpreting counterpart provision of FOIA).

10. 5 U.S.C. § 552a(b)(10) (General Accounting Office)

"to the Comptroller General, or any of his authorized representatives, in the course of the performance of the duties of the General Accounting Office."

11. 5 U.S.C. § 552a(b)(11) (court order)

"pursuant to the order of a court of competent jurisdiction."

comment -- This exception--like the subsection (b)(3) routine use exception--has generated a great deal of uncertainty. Unfortunately, neither the Act's legislative history, see 120 Cong. Rec. 36,959 (1974), reprinted in Source Book at 936, nor the OMB Guidelines, see 40 Fed.

Reg. 28,948, 28,955 (1975), shed light on its meaning.

As a general proposition, it appears that the essential point of this exception is that the Privacy Act "cannot be used to block the normal course of court proceedings, including court-ordered discovery." Clavir v. United States, 84 F.R.D. 612, 614 (S.D.N.Y. 1979); see also, e.g., Martin v. United States, 1 Cl. Ct. 775, 780-82 (Cl. Ct. 1983); Newman v. United States, No. 81-2480, slip op. at 3 (D.D.C. Sept. 13, 1982).

What Does "Court Order" Mean?

In Doe v. DiGenova, 779 F.2d 74, 77-85 (D.C. Cir. 1985), the Court of Appeals for the District of Columbia Circuit decisively ruled that a subpoena routinely issued by a court clerk--such as a federal grand jury subpoena--is not a "court order" within the meaning of this exception because it is not "specifically approved" by a judge. Prior to Doe v. DiGenova, a split of authority existed on this point. Compare Bruce v. United States, 621 F.2d 914, 916 (8th Cir. 1980) (dictum) (subpoena not court order), and Stiles v. Atlanta Gas Light Co., 453 F. Supp. 798, 800 (N.D. Ga. 1978) (same), with Adams v. United States Lines, No. 80-0952, slip op. at 2-3 (E.D. La. Mar. 16, 1981) (subpoena is court order). Cf. Moore v. United States Postal Serv., 609 F. Supp. 681, 682 (E.D.N.Y. 1985) (subpoena is court order where required to be approved by judge under state law).

Note that an agency cannot avoid the result in Doe v. DiGenova by relying on a routine use that seeks to authorize disclosure pursuant to a subpoena. See Doe v. Stephens, 851 F.2d 1457, 1465-67 (D.C. Cir. 1988) (discussed above under routine use exception).

What is the Standard for Issuance of a Court Order?

Unlike similar provisions in other federal confidentiality statutes, see, e.g., 42 U.S.C. § 290dd-2 (1994) (listing "good cause" factors to be weighed by court in evaluating applications for orders permitting disclosure of records pertaining to substance abuse), subsection (b)(11) contains no standard governing the issuance of an order authorizing the disclosure of otherwise protected Privacy Act information. However, several courts have addressed the issue with varying degrees of clarity. It has been held, for example, that because

the Privacy Act does not itself create a qualified discovery "privilege," a showing of "need" is not a prerequisite to initiating discovery of protected records. See Laxalt v. McClatchy, 809 F.2d 885, 888-90 (D.C. Cir. 1987); see also Weahkee v. Norton, 621 F.2d 1080, 1082 (10th Cir. 1980) (noting that objection to discovery of protected records "does not state a claim of privilege"); Bosaw v. NTEU, 887 F. Supp. 1199, 1215-17 (S.D. Ind. 1995) (citing Laxalt with approval, although ultimately determining that court did not have jurisdiction to rule on merits of case); Ford Motor Co. v. United States, 825 F. Supp. 1081, 1083 (Ct. Int'l Trade 1993) ("[T]he Privacy Act does not establish a qualified discovery privilege that requires a party seeking disclosure under 5 U.S.C. § 552a(b)(11) to prove that its need for the information outweighs the privacy interest of the individual to whom the information relates."); Clavir v. United States, 84 F.R.D. at 614 ("it has never been suggested that the Privacy Act was intended to serve as a limiting amendment to . . . the Federal Rules of Civil Procedure"); cf. Baldrige v. Shapiro, 455 U.S. 345, 360-62 (1981) (Census Act held to constitute statutorily created discovery "privilege" because it precludes all disclosure of raw census data despite need demonstrated by litigant).

Rather, Laxalt v. McClatchy establishes that the only test for discovery of Privacy Act-protected records is "relevance" under Rule 26(b)(1) of the Federal Rules of Civil Procedure. 809 F.2d at 888-90; see also, e.g., Forrest v. United States, No. 95-3889, 1996 WL 171539, at *2 (E.D. Pa. Apr. 11, 1996); Bosaw, 887 F. Supp. at 1216-17 (citing Laxalt with approval, although ultimately determining that court did not have jurisdiction to rule on merits of case); Ford Motor Co., 825 F. Supp. at 1083-84; Mary Imogene Bassett Hosp. v. Sullivan, 136 F.R.D. 42, 49 (N.D.N.Y. 1991); O'Neill v. Engels, 125 F.R.D. 518, 520 (S.D. Fla. 1989); Murray v. United States, No. 84-2364, slip op. at 1-3 (D. Kan. Feb. 21, 1988); Broderick v. Shad, 117 F.R.D. 306, 312 (D.D.C. 1987); Smith v. Regan, No. 81-1401, slip op. at 1-2 (D.D.C. Jan. 9, 1984); In re Grand Jury Subpoenas Issued to United States Postal Serv., 535 F. Supp. 31, 33 (E.D. Tenn. 1981); Christy v. United States, 68 F.R.D. 375, 378 (N.D. Tex. 1975). But see Perry v. State Farm Fire & Cas. Co., 734 F.2d 1441, 1447 (11th Cir. 1984) (requests for court orders "should be evaluated by balancing the need for the disclosure against the potential harm to the subject of the disclosure"); Newman, No. 81-

2480, slip op. at 3 (D.D.C. Sept. 13, 1982) (evaluating "legitimacy" of discovery requests and "need" for records as factors governing issuance of court order).

However, it is important to note that a protective order limiting discovery under Rule 26(c) of the Federal Rules of Civil Procedure (based, if appropriate, upon a court's careful in camera inspection) is a proper procedural device for protecting particularly sensitive Privacy Act-protected records when subsection (b)(11) court orders are sought. See Laxalt, 809 F.2d at 889-90; see also, e.g., Wright v. United States, No. 95-0274, 1996 WL 525324 (D.D.C. Sept. 10, 1996) (order "pursuant to the Privacy Act and Rule 26 of the Federal Rules of Civil Procedure" establishing procedures to be followed by parties "[i]n order to permit the parties to use information relevant to th[e] case without undermining the legislative purposes underlying the Privacy Act"); Bosaw, 887 F. Supp. at 1216-17 (citing Laxalt with approval, although ultimately determining that court did not have jurisdiction to rule on merits of case); PHE, Inc. v. Department of Justice, No. 90-0693, slip op. at 13 & accompanying order (D.D.C. Nov. 14, 1991); Mary Imogene Bassett Hosp. v. Sullivan, 136 F.R.D. at 49; Avirgan v. Hull, Misc. No. 88-0112, slip op. at 1-3 (Bankr. D.D.C. May 2, 1988); Baron & Assocs. v. United States Dep't of the Army, No. 84-2021, slip op. at 2-4 (D.D.C. Apr. 1, 1985); Granton v. HHS, No. 83-C-3538, slip op. at 1-2 (N.D. Ill. Feb. 27, 1984); White House Vigil for the ERA Comm. v. Watt, No. 83-1243, slip op. at 1-3 (D.D.C. Oct. 14, 1983); LaBuguen v. Bolger, No. 82-C-6803 (N.D. Ill. Sept. 21, 1983) (order); Clymer v. Grzegorek, 515 F. Supp. 938, 942 (E.D. Va. 1981); cf. Forrest, 1996 WL 171539, at **2-3 (parties ordered to "explore the possibility of entering into a voluntary confidentiality agreement regarding protecting the privacy interests of those individuals affected by disclosure"); Loma Linda Community Hosp. v. Shalala, 907 F. Supp. 1399, 1405 (C.D. Cal. 1995) ("Even if release of the data . . . had unexpectedly included information not already known to [the recipient], a confidentiality order could have been imposed to protect the privacy interests in issue."); Williams v. McCausland, No. 90 Civ. 7563, slip op. at 5-8 (S.D.N.Y. Oct. 15, 1992) (parties directed to agree on and execute appropriate protective stipulation for information sought in discovery that, under Privacy Act's (b)(2) standard, would not be required to be disclosed under FOIA). In some instances, it may even be appropriate for a court to en-

tirely deny discovery. See, e.g., Farnsworth v. Proctor & Gamble Co., 758 F.2d 1545, 1546-48 (11th Cir. 1985); Oslund v. United States, 125 F.R.D. 110, 114-15 (D. Minn. 1989); cf. Barnett v. Dillon, 890 F. Supp. 83, 88 (N.D.N.Y. 1995) (declining to order disclosure of FBI investigative records protected by Privacy Act to arrestees despite their assertion that records were essential to proper prosecution and presentment of claims in their civil rights lawsuit).

In Redland Soccer Club, Inc. v. Department of the Army of the United States, No. 1:CV-90-1072, slip op. 1-3 & accompanying order (M.D. Pa. Jan. 14, 1991), aff'd, rev'd & remanded on other grounds, 55 F.3d 827 (3d Cir. 1995), cert. denied, 116 S. Ct. 772 (1996), the court, recognizing the "defendants' initial reluctance to respond to plaintiffs' [discovery] requests without a specific order of court [as] a reasonable precaution in light of the terms of the Privacy Act," solved the dilemma by ordering that the Army respond to "all properly framed discovery requests in th[e] proceeding" and that such responses were to "be deemed made pursuant to an order of court." Id.

Must an Agency Obtain a Court Order to Publicly File Protected Records with the Court?

As noted above, the Act's legislative history indicates that a court is not a "person" or "agency" within the meaning of subsection (b), and that the Act was "not designed to interfere with access to information by the courts." 120 Cong. Rec. 36,967 (1974), reprinted in Source Book at 958-59. However, the nonconsensual public filing of protected records with a court, during the course of litigation, does constitute a subsection (b) disclosure. See Laningham v. United States Navy, No. 83-3238, slip op. at 2-3 (D.D.C. Sept. 25, 1984), summary judgment granted (D.D.C. Jan. 7, 1985), aff'd per curiam, 813 F.2d 1236 (D.C. Cir. 1987); Citizens Bureau of Investigation v. FBI, No. 78-60, slip op. at 3 (N.D. Ohio Dec. 14, 1979). Thus, such public filing is proper only if it is undertaken pursuant to: (1) the subsection (b)(3) routine use exception (previously discussed), or (2) the subsection (b)(11) court order exception.

Where the routine use exception is unavailable, an agency should obtain a subsection (b)(11) court order permitting such public filing. Cf. Doe v. DiGenova, 779 F.2d at 85 n.20 ("This is not to say that a prosecutor,

a defendant, or a civil litigant, cannot submit an in camera ex parte application for a [subsection (b)(11)] court order."). However, in light of Laningham, No. 83-3238, slip op. at 2-3 (D.D.C. Sept. 25, 1984), agencies should be careful to apprise the court of the Privacy Act-related basis for seeking the order. In Laningham, the district court ruled that the government's nonconsensual disclosure of plaintiff's "disability evaluation" records to the United States Claims Court was improper--even though such records were filed only after the agency's motion for leave to file "out of time" was granted. Id. The court held that subsection (b)(11) applies only when "for compelling reasons, the court specifically orders that a document be disclosed," and it rejected the agency's argument that the exception applies whenever records happen to be filed with leave of court. Id. at 4.

One unique solution to the problem of filing Privacy Act-protected records in court is illustrated by In re A Motion for a Standing Order, No. 90-85, slip op. at 7-9 (Ct. Vet. App. July 2, 1990), in which the Court of Veterans Appeals issued a "standing order" permitting the Secretary of Veterans Affairs to routinely file relevant records from a veteran's case file with the court.

What Does "Competent Jurisdiction" Mean?

One of the few Privacy Act decisions to even mention this often-overlooked requirement is Laxalt v. McClatchy, 809 F.2d at 890-91. In that case, the Court of Appeals for the District of Columbia Circuit appeared to equate the term "competent jurisdiction" with personal jurisdiction, noting that the requests for discovery of the nonparty agency's records "were within the jurisdiction of the District Court for the District of Columbia" as "[n]either party contends that the District Court lacked personal jurisdiction over the FBI's custodian of records." Id.

Of course, where an agency is a proper party in a federal case, the district court's personal jurisdiction over the agency presumably exists and thus court-ordered discovery of the agency's records is clearly proper under subsection (b)(11).

However, where a party seeks discovery of a nonparty agency's records--pursuant to a subpoena duces tecum issued under Rule 45 of the Federal Rules of Civil Procedure--Laxalt suggests that the district court issuing the discovery order must have personal jurisdic-

tion over the nonparty agency in order to be regarded as a court of "competent jurisdiction" within the meaning of subsection (b)(11). See 809 F.2d at 890-91. The issue of whether personal jurisdiction exists in this kind of situation is not always a clear-cut one--particularly where the nonparty agency's records are kept at a place beyond the territorial jurisdiction of the district court that issued the discovery order. Indeed, this very issue was apparently raised but not decided in Laxalt, 809 F.2d at 890-91 (finding it unnecessary to decide whether federal district court in Nevada would have had jurisdiction to order discovery of FBI records located in District of Columbia).

The existence of "competent jurisdiction" is likewise questionable whenever a state court orders the disclosure of a nonparty federal agency's records--because ordinarily the doctrine of "sovereign immunity" will preclude state court jurisdiction over a federal agency or official. See, e.g., Bosaw, 887 F. Supp. at 1210-17 (state court lacked jurisdiction to order federal officers to produce documents because government did not explicitly waive its sovereign immunity and, because federal court's jurisdiction in this case was derivative of state court's jurisdiction, federal court was likewise barred from ordering officers to produce documents); Boron Oil Co. v. Downie, 873 F.2d 67, 70-71 (4th Cir. 1989) (state court subpoena held to constitute "action" against United States and thus sovereign immunity applied even though EPA was not party in suit); Sharon Lease Oil Co. v. Federal Energy Regulatory Comm'n, 691 F. Supp. 381, 383-85 (D.D.C. 1988) (state court subpoena quashed as state court lacked jurisdiction to compel nonparty federal official to testify or produce documents absent waiver of sovereign immunity); see also Moore v. Armour Pharm. Co., 129 F.R.D. 551, 555 (N.D. Ga. 1990) (citing additional cases on point); cf. Louisiana v. Sparks, 978 F.2d 226, 235 n.15 (5th Cir. 1992) (noting that "[t]here is no indication that [(b)(11)] evinces congressional intent to broadly waive the sovereign immunity of [federal] agencies . . . when ordered to comply with state court subpoenas").

In Moore v. United States Postal Serv., 609 F. Supp. 681, 682 (E.D.N.Y. 1985), the court assumed without explanation that a state court subpoena, required by state law to be approved by a judge, constituted a proper subsection (b)(11) court order; the issue of "competent jurisdiction" was not addressed.

Cf. Henson v. Brown, No. 95-213, slip op. at 4-5 (D. Md. June 23, 1995) (although not disputed by parties, stating that judge's signature elevated subpoena to court order within meaning of subsection (b)(11) in context of determining whether defendant complied with order). At least one state court has ruled that it has "competent jurisdiction" to issue a subsection (b)(11) court order permitting the disclosure of a Privacy Act-protected record. Tootle v. Seaboard Coast Line R.R. Co., 468 So. 2d 237, 239 (Fla. Dist. Ct. App. 1984); cf. Saulter v. Municipal Court for the Oakland-Piedmont Judicial Dist., 142 Cal. App. 3d 266, 275 (Cal. Ct. App. 1977) (suggesting that state court can order state prosecutor to subpoena federal records for purpose of disclosing them to criminal defendant in discovery).

OMB has informally advised that agencies may disclose Privacy Act-protected records pursuant to a state court order under subsection (b)(11), even though that court lacks personal jurisdiction over the agency. Agencies should, however, be aware that compliance with such an order might be taken by a court as acquiescence to the court's jurisdiction, despite applicable principles of sovereign immunity.

12. 5 U.S.C. § 552a(b)(12) (Debt Collection Act)

"to a consumer reporting agency in accordance with section 3711(e) of Title 31."

comment -- This disclosure exception was added to the original eleven exceptions by the Debt Collection Act of 1982. It authorizes agencies to disclose bad-debt information to credit bureaus. Before doing so, however, agencies must complete a series of due process steps designed to validate the debt and to offer the individual an opportunity to repay it. See OMB Guidelines, 48 Fed. Reg. 15,556-60 (1983).

ACCOUNTING OF CERTAIN DISCLOSURES

(1) Each agency, with respect to each system of records under its control, must keep a record of the date, nature, and purpose of each disclosure of a record to any person or to another agency under subsection (b) and the name and address of the person or agency to whom the disclosure is made. See 5 U.S.C. § 552a(c)(1). An accounting need not be kept of intra-agency disclosures (5 U.S.C. § 552a(b)(1)) or FOIA disclosures (5 U.S.C. § 552a(b)(2)). See 5 U.S.C. § 552a(c)(1).

(2) This accounting of disclosures must be kept for five years or the life of the record, whichever is longer, after the

disclosure for which the accounting is made. See 5 U.S.C. § 552a

(3) Except for disclosures made under subsection (b)(7), an individual is entitled, upon request, to get access to this accounting of disclosures of his record. See 5 U.S.C. § 552a(c)(3).

(4) An agency must inform any person or other agency about any correction or notation of dispute made by the agency in accordance with subsection (d) of any record that has been disclosed to the person or agency if an accounting of the disclosure was made. See 5 U.S.C. § 552a(c)(4).

comment -- The language of subsection (c)(1) explicitly excepts both intra-agency "need to know" disclosures and FOIA disclosures from its coverage. See, e.g., Quinn v. United States Navy, No. 94-56067, 1995 WL 341513, at *1 (9th Cir. June 8, 1995) (only disclosure of records was within Navy and thus was exempt from accounting requirements); Clarkson v. IRS, 811 F.2d 1396, 1397-98 (11th Cir. 1987) (per curiam) (IRS's internal disclosure of records to its criminal investigation units does not require accounting).

It is important to recognize that subsection (c)(3) grants individuals a right of access similar to the access right provided by subsection (d)(1). See Standley v. Department of Justice, 835 F.2d 216, 219 (9th Cir. 1987) (plaintiff entitled to gain access to list, compiled by U.S. Attorney, of persons in IRS to whom disclosures of grand jury materials about plaintiff were made); Ray v. United States Dep't of Justice, 558 F. Supp. 226, 228 (D.D.C. 1982) (addresses of private persons who requested plaintiff's records required to be released to plaintiff notwithstanding that "concern about possible harrassment [sic] of these individuals may be legitimate"), aff'd, 720 F.2d 216 (D.C. Cir. 1983) (unpublished table decision); cf. Quinn, 1995 WL 341513, at *1 (no records to disclose in response to request for accounting because there were no disclosures that required accounting).

Of course, it should not be overlooked that certain Privacy Act exemptions--5 U.S.C. § 552a(j) and (k)--are potentially available to shield an "accounting of disclosures" record from release to the subject thereof under subsection (c)(3). See Standley, 835 F.2d at 219 (remanding case for consideration of whether exemptions are applicable); Mittleman v. United States Dep't of the Treasury, 919 F. Supp. 461, 469 (D.D.C. 1995) (finding that "application of exemption (k)(2) . . . is valid" and that Department of Treasury Inspector General's "General Allegations and Investigative Records System" is exempt "because, inter alia, application of the accounting-of-disclosures provision . . . would alert the subject to the existence of an investigation, possibly resulting in hindrance of an investiga-

tion"), aff'd in part & remanded in part on other grounds, 104 F.3d 410 (D.C. Cir. 1997); Bagley v. FBI, No. 88-4075, slip op. at 2-4 (N.D. Iowa Aug. 28, 1989) (applying subsection (j)(2)); see also Hart v. FBI, No. 94 C 6010, 1995 U.S. Dist. LEXIS 4542, at *6 n.1 (N.D. Ill. Apr. 7, 1995) (noting exemption of FBI's Criminal Justice Information Services Division Records System), aff'd, 91 F.3d 146 (7th Cir. 1996) (unpublished table decision).

For a further discussion of this provision, see OMB Guidelines, 40 Fed. Reg. 28,948, 28,955-56 (1975).

INDIVIDUAL'S RIGHT OF ACCESS

"Each agency that maintains a system of records shall--upon request by any individual to gain access to his record or to any information pertaining to him which is contained in the system, permit him and upon his request, a person of his own choosing to accompany him, to review the record and have a copy made of all or any portion thereof in a form comprehensible to him, except that the agency may require the individual to furnish a written statement authorizing discussion of that individual's record in the accompanying person's presence." 5 U.S.C. § 552a(d)(1).

comment -- The Privacy Act provides individuals with a means of access similar to that of the Freedom of Information Act. The statutes do overlap, but not entirely. See generally Greentree v. United States Customs Serv., 674 F.2d 74, 76-80 (D.C. Cir. 1982). The FOIA is entirely an access statute; it permits "any person" to seek access to any "agency record" that is not subject to any of its nine exemptions or its three exclusions. By comparison, the Privacy Act permits only an "individual" to seek access to only his own "record," and only if that record is maintained by the agency within a "system of records"--i.e., is retrieved by that individual requester's name or personal identifier--subject to ten Privacy Act exemptions (see discussion of Privacy Act exemptions, below). Thus, the primary difference between the FOIA and the access provision of the Privacy Act is in the scope of information requestable under each statute.

An individual's access request for his own record maintained in a system of records should be processed under both the Privacy Act and the FOIA, regardless of the statute(s) cited. See H.R. Rep. No. 98-726, pt. 2, at 16-17 (1984), reprinted in 1984 U.S.C.C.A.N. 3741, 3790-91 (regarding amendment of Privacy Act in 1984 to include subsection (t)(2) and stating: "Agencies that had made it a practice to treat a request made under either [the Privacy Act or the FOIA] as if the request had been made under both laws should continue to do so."); FOIA Update, Winter 1986, at 6; see also Harvey v. United States Dep't of Justice, No. 92-176-BLG, slip op. at 8 (D. Mont. Jan. 9, 1996) ("Even though information may be withheld under the [Privacy Act], the inquiry does

not end. The agency must also process requests under the FOIA, since the agency may not rely upon an exemption under the [Privacy Act] to justify nondisclosure of records that would otherwise be accessible under the FOIA. 5 U.S.C. § 552a(t)(2)."), aff'd, 116 F.3d 484 (9th Cir. 1997) (unpublished table decision); cf. Wren v. Harris, 675 F.2d 1144, 1146 & n.5 (10th Cir. 1982) (per curiam) (construing pro se complaint to seek information under either Privacy Act or FOIA even though only FOIA was referenced by name); Hunsberger v. United States Dep't of Justice, No. 92-2587, slip op. at 2 n.2 (D.D.C. July 22, 1997) (system from which documents at issue were retrieved was exempt pursuant to Privacy Act exemption (j)(2), "[c]onsequently, the records were processed for release under the FOIA"); Kitchen v. FBI, No. 93-2382, slip op. at 7 (D.D.C. Mar. 18, 1996) (although all requested documents were exempt under Privacy Act, they "were also processed under FOIA in the interest of full disclosure"); Kitchen v. DEA, No. 93-2035, slip op. at 9 (D.D.C. Oct. 12, 1995) (same), appeal dismissed for failure to prosecute, No. 95-5380 (D.C. Cir. Dec. 11, 1996); Freeman v. United States Dep't of Justice (FBI), 822 F. Supp. 1064, 1066 (S.D.N.Y. 1993) (implicitly accepting defendant's rationale that "because documents releasable pursuant to FOIA may not be withheld as exempt under the Privacy Act," it is proper for agency not to distinguish between FOIA and Privacy Act requests when assigning numbers to establish order of processing, and quoting Report of House Committee on Government Operations, H.R. Rep. No. 726, as mandating such practice); Pearson v. DEA, No. 84-2740, slip op. at 2 (D.D.C. Jan. 31, 1986) (same as Wren).

It should be noted that the Privacy Act--like the FOIA--does not require agencies to create records that do not exist. See DeBold v. Stimson, 735 F.2d 1037, 1041 (7th Cir. 1984); Perkins v. IRS, No. 86-CV-71551, slip op. at 4 (E.D. Mich. Dec. 16, 1986); see also, e.g., Villanueva v. Department of Justice, 782 F.2d 528, 532 (5th Cir. 1986) (rejecting argument that FBI was required to "find a way to provide a brief but intelligible explanation for its decision . . . without [revealing exempt information]"). But compare May v. Department of the Air Force, 777 F.2d 1012, 1015-17 (5th Cir. 1985) ("reasonable segregation requirement" obligates agency to create and release typewritten version of handwritten evaluation forms so as not to reveal identity of evaluator under exemption (k)(7)), with Church of Scientology W. United States v. IRS, No. CV-89-5894, slip op. at 4 (C.D. Cal. Mar. 5, 1991) (FOIA decision rejecting argument based upon May and holding that agency not required to create records).

For a discussion of the unique procedures involved in processing first-party requests for medical records, see discussion below under 5 U.S.C. § 552a(f)(3).

FOIA/PRIVACY ACT INTERFACE EXAMPLE: ACCESS

Suppose John Q. Citizen writes to Agency: "Please send to me all records that you have on me."

For purposes of this example, assume that the only responsive records are contained in a system of records retrieved by Mr. Citizen's own name or personal identifier. Thus, both the Privacy Act and the FOIA potentially apply to the records.

(1) IF NO PRIVACY ACT EXEMPTION APPLIES

Result: Mr. Citizen should receive access to his Privacy Act records where Agency can invoke no Privacy Act exemption.

The Agency cannot rely upon a FOIA exemption alone to deny Mr. Citizen access to any of his records under the Privacy Act. See 5 U.S.C. § 552a(t)(1); see also Martin v. Office of Special Counsel, 819 F.2d 1181, 1184 (D.C. Cir. 1987) ("If a FOIA exemption covers the documents, but a Privacy Act exemption does not, the documents must be released under the Privacy Act.") (emphasis added); Viotti v. United States Air Force, 902 F. Supp. 1331, 1336-37 (D. Colo. 1995) ("If the records are accessible under the Privacy Act, the exemptions from disclosure in the FOIA are inapplicable."); Savada v. DOD, 755 F. Supp. 6, 9 (D.D.C. 1991) (citing Martin for proposition that "[i]f an individual is entitled to a document under FOIA and the Privacy Act, to withhold this document an agency must prove that the document is exempt from release under both statutes"); cf. Stone v. Defense Investigative Serv., 816 F. Supp. 782, 788 (D.D.C. 1993) ("[T]he Court must determine separately [from the FOIA] whether plaintiff is entitled to any of the withheld information under the Privacy Act."); Rojem v. United States Dep't of Justice, 775 F. Supp. 6, 13 (D.D.C. 1991) ("[T]here are instances in which the FOIA denies access and the Privacy Act compels release."), appeal dismissed for failure to timely file, No. 92-5088 (D.C. Cir. Nov. 4, 1992); Ray v. United States Dep't of Justice, 558 F. Supp. 226, 228 (D.D.C. 1982) (requester entitled, under subsection (c)(3), to addresses of private persons who requested information about him as "defendant is unable to cite a specific [Privacy Act] exemption that justifies non-disclosure of this information"), aff'd, 720 F.2d 216 (D.C. Cir. 1983) (unpublished table decision).

In other words, a requester is entitled to the combined total of what both statutes provide. See Clarkson v. IRS, 678 F.2d 1368, 1376 (11th Cir. 1982); Wren v. Harris, 675 F.2d 1144, 1147 (10th Cir. 1982) (per curiam); Searcy v. Social Sec. Admin., No. 91-C-26 J, slip op. at 7-8 (D. Utah June 25, 1991) (magistrate's recommendation), adopted (D. Utah Sept. 19, 1991), aff'd,

No. 91-4181 (10th Cir. Mar. 2, 1992); Whittle v. Moschella, 756 F. Supp. 589, 595 (D.D.C. 1991); Fagot v. FDIC, 584 F. Supp. 1168, 1173-74 (D.P.R. 1984), aff'd in part & rev'd in part, 760 F.2d 252 (1st Cir. 1985) (unpublished table decision); see also 120 Cong. Rec. 40,406 (1974), reprinted in Source Book at 861. For access purposes, the two statutes work completely independently of one another.

(2) IF A PRIVACY ACT EXEMPTION APPLIES

Result: Where a Privacy Act exemption applies, Mr. Citizen is not entitled to obtain access to his records under the Privacy Act.

But he may still be able to obtain access to his records (or portions thereof) under the FOIA. See 5 U.S.C. § 552a(t)(2) (Privacy Act exemption(s) cannot defeat FOIA access); Martin, 819 F.2d at 1184 ("[I]f a Privacy Act exemption but not a FOIA exemption applies, the documents must be released under FOIA.") (emphasis added); Savada, 755 F. Supp. at 9 (citing Martin and holding that agency must prove that document is exempt from release under both FOIA and Privacy Act); see also Shapiro v. DEA, 762 F.2d 611, 612 (7th Cir. 1985); Grove v. CIA, 752 F. Supp. 28, 30 (D.D.C. 1990); Simon v. United States Dep't of Justice, 752 F. Supp. 14, 22 (D.D.C. 1990), aff'd, 980 F.2d 782 (D.C. Cir. 1992); Miller v. United States, 630 F. Supp. 347, 348-49 (E.D.N.Y. 1986); Nunez v. DEA, 497 F. Supp. 209, 211 (S.D.N.Y. 1980). The outcome will depend upon FOIA exemption applicability. See generally FOIA Update, Spring 1994, at 3-6 (encouraging discretionary disclosure whenever possible despite FOIA exemption applicability); FOIA Update, Spring 1997, at 1 (same).

(3) IF NO PRIVACY ACT EXEMPTION AND NO FOIA EXEMPTION APPLIES

Result: The information should be disclosed.

(4) IF BOTH PRIVACY ACT AND FOIA EXEMPTIONS APPLY

Result: The record may be withheld. But remember: When an individual requests access to his own record (a first-party request) maintained in a system of records, an agency must be able to invoke properly both a Privacy Act exemption and a FOIA exemption in order to withhold that record.

Rule: ALL PRIVACY ACT ACCESS REQUESTS SHOULD ALSO BE TREATED AS FOIA REQUESTS

Note also that Mr. Citizen's first-party request--because it is a FOIA request as well--additionally obligates Agency to search for any records on him that are not maintained in a Privacy Act system of records. With respect to those records, only the FOIA's exemptions are

relevant; the Privacy Act's access provision and exemptions are entirely inapplicable to any records not maintained in a system of records.

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comment -- A particularly troubling and unsettled problem under the Privacy Act arises where a file indexed and retrieved by the requester's name or personal identifier contains information pertaining to a third party that, if released, would invade that third party's privacy.

As a preliminary matter, it should be noted that this problem arises only when a requester seeks access to his record contained in a non-law enforcement system of records--typically a personnel or background security investigative system--inasmuch as agencies are generally permitted to exempt the entirety of their criminal and civil law enforcement systems of records from the subsection (d)(1) access provision pursuant to 5 U.S.C. § 552a(j)(2) and (k)(2).

The problem stems from the fact that unlike under the FOIA, see 5 U.S.C. § 552(b)(6), (7)(C), the Privacy Act (ironically) does not contain any exemption that protects a third party's privacy. Cf. 5 U.S.C. § 552a(k)(5) (protecting only confidential source-identifying information in background security investigative systems). The Privacy Act's access provision simply permits an individual to gain access to "his record or to any information pertaining to him" that is contained in a system of records indexed and retrieved by his name or personal identifier. 5 U.S.C. § 552a(d)(1).

The leading case in this area is Voelker v. IRS, 646 F.2d 332, 333-35 (8th Cir. 1981). In Voelker, the Court of Appeals for the Eighth Circuit held that where the requested information--contained in a system of records indexed and retrieved by the requester's name--is "about" that requester within the meaning of subsection (a)(4)'s definition of a "record," all such information is subject to the subsection (d)(1) access provision. Id. at 334. In construing subsection (d)(1), the Eighth Circuit noted that there is "no justification for requiring that information in a requesting individual's record meet some separate `pertaining to' standard before disclosure is authorized [and i]n any event, it defies logic to say that information properly contained in a person's record does not pertain to that person, even if it may also pertain to another individual." Id. Relying on the importance of the access provision to the enforcement of other provisions of the Privacy Act, and the lack of any provision in the exemption portion of the statute to protect a third party's privacy, the Eighth Circuit rejected the government's argument that subsection (b) prohibited disclosure to the requester of the information about a third party. Id. at 334-35. A careful reading of Voelker reveals that the Eighth Circuit appeared to

equate the term "record" with "file" for subsection (d)(1) access purposes.

The District Court for the District of Columbia recently agreed with, and applied the reasoning of, Voelker in Henke v. United States Dep't of Commerce, No. 94-0189, 1996 WL 692020, at *4 (D.D.C. Aug. 19, 1994), aff'd on other grounds, 83 F.3d 1445 (D.C. Cir. 1996). In Henke, the government argued that information pertaining to third parties was exempt from disclosure because the same information was also contained in a system of records as to the third parties, and that disclosure of the information would violate subsection (b). Relying on Voelker, the court rejected the government's argument that information contained in one individual's records is exempt from the disclosure requirements of the Privacy Act simply because the same information is also contained in another individual's records, and it further stated that it would "not create an exemption to the Privacy Act that [C]ongress did not see fit to include itself." Id. On two earlier occasions, the D.C. District court had held that subsection (b) could protect third-party information in a requester's file. See Savada v. DOD, 755 F. Supp. 6, 10 (D.D.C. 1991) (names of DIA security officials involved in investigation of plaintiff); Anderson v. United States Dep't of the Treasury, No. 76-1404, slip op. at 11-13 (D.D.C. July 19, 1977) (name of complainant). However, the rationale of these decisions is not entirely clear, and neither opinion was even mentioned in the more recent Henke opinion.

The result in Voelker also finds some tangential support in two other decisions--Wren v. Harris, 675 F.2d 1144, 1147 (10th Cir. 1982) (per curiam), and Ray v. United States Dep't of Justice, 558 F. Supp. 226, 228 (D.D.C. 1982), aff'd, 720 F.2d 216 (D.C. Cir. 1983) (unpublished table decision). In Wren, the Court of Appeals for the Tenth Circuit reversed a district court's judgment that FOIA Exemption 6 protected certain third-party information requested under the Privacy Act. 675 F.2d at 1147. In so ruling, the Tenth Circuit stated that "[o]n remand, should the district court find that the documents requested by Mr. Wren consist of `his record' or `any information pertaining to him,' and that they are `records' contained in a `system of records,' § 552a(a)(4), (5), (d)(1), then the court must grant him access to those documents as provided in § 552a(d)(1), unless the court finds that they are exempt from disclosure under [Privacy Act exemptions]," and it further observed that "the [district] court's reliance on [FOIA Exemption 6] to withhold the documents would be improper if the court determines that the [Privacy Act] permits disclosure." Id. In Ray, the court ruled that the requester was entitled to access, under subsection (c)(3), to the addresses of private persons who had requested information about him because no Privacy Act exemption justified withholding such informa-

tion, notwithstanding that the agency's "concern about possible harrassment [sic] of these individuals may be legitimate." 558 F. Supp. at 228.

Voelker's rationale was purportedly distinguished (but in actuality was rejected) in DePlanche v. Califano, 549 F. Supp. 685, 693-98 (W.D. Mich. 1982), a case involving a father's request for access to a social security benefits file indexed and retrieved by his social security number which contained the address of his two minor children. In denying the father access to the children's address, the court reasoned that such third-party information, although contained in the father's file, was not "about" the father, and therefore by definition was not his "record" within the meaning of subsection (a)(4), nor was it information "pertaining" to him within the meaning of the subsection (d)(1) access provision. Id. at 694-96. In distinguishing Voelker, the court relied upon an array of facts suggesting that the father might harass or harm his children if their location were to be disclosed. Id. at 693, 696-98; see also Nolan v. United States Dep't of Justice, No. 89-A-2035, slip op. at 16 (D. Colo. Mar. 18, 1991) (names of FBI agents and other personnel held not requester's "record" and therefore "outside the scope of the [Privacy Act]"), aff'd, 973 F.2d 843 (10th Cir. 1992); Springmann v. United States Dep't of State, No. 93-1238, slip op. at 8 & n.1 (D.D.C. Apr. 21, 1997) (citing Nolan and holding that name of foreign official who provided information to State Department and names of foreign service officers (other than plaintiff) who were denied tenure were "not accessible to plaintiff under the Privacy Act because the identities of these individuals d[id] not constitute information `about' plaintiff, and therefore [we]re not `records' with respect to plaintiff under the Privacy Act"); Hunsberger v. CIA, No. 92-2186, slip op. at 3-4 (D.D.C. Apr. 5, 1995) (citing Nolan and holding that names of employees of private insurance company used by Director of Central Intelligence and Director's unique professional liability insurance certificate number maintained in litigation file created as result of plaintiff's prior suit against CIA Director were not "about" plaintiff and therefore were not "record[s]" within meaning of Privacy Act); Doe v. United States Dep't of Justice, 790 F. Supp. 17, 22 (D.D.C. 1992) (citing Nolan and alternatively holding that "names of agents involved in the investigation are properly protected from disclosure"); cf. Allard v. HHS, No. 4:90-CV-156, slip op. at 9-11 (W.D. Mich. Feb. 14, 1992) (citing DePlanche with approval and arriving at same result, but conducting analysis solely under FOIA Exemption 6), aff'd, 972 F.2d 346 (6th Cir. 1992) (unpublished table decision).

The District Court for the District of Columbia was confronted with a more complex version of this issue in Topuridze v. USIA, 772 F. Supp. 662 (D.D.C. 1991), reconsidering Topuridze v. FBI, No. 86-3120

(D.D.C. Feb. 6, 1989), when the subject of a letter requested access to it and the agencies withheld it to protect the author's privacy interests. In Topuridze, the issue of access to third party information in a requester's file was further complicated by the fact that the information was "retrievable" by both the requester's identifier and the third party's identifier, Topuridze v. FBI, No. 86-3120, slip op. at 2-3 (D.D.C. Feb. 6, 1989)--the record was subject to "dual retrieval." In apparent contradiction to the subsection (d)(1) access provision, subsection (b) prohibits the nonconsensual disclosure of an individual's record contained in a system of records indexed and retrieved by his name or personal identifier to any third party. See 5 U.S.C. § 552a(b). Because the letter was both the requester's and the third party's Privacy Act record, the government argued that subsection (b), though technically not an "exemption," nevertheless restricts first-party access under subsection (d)(1) where the record is about both the requester and the third-party author, and is located in a system of records that is "retrievable" by both their names. See Topuridze v. FBI, No. 86-3120, slip op. at 2-3 (D.D.C. Feb. 6, 1989); Topuridze v. USIA, 772 F. Supp. at 665-66. Although the court had previously ruled that the document was not about the author, see Topuridze v. FBI, No. 86-3120, slip op. at 3-4 (D.D.C. Feb. 6, 1989), on reconsideration it ruled that it need not reach that issue, finding that "[b]ecause the document is without dispute about the [requester], it must be released to him in any event." 772 F. Supp. at 665. On reconsideration, the court embraced Voelker and rejected the government's argument that subsection (b) created a "dual record exemption" to Privacy Act access. Id. at 665-66.

Although Topuridze has provided further guidance, the difficult issue of an individual's right to access third party information retrieved by his name can be resolved only with careful consideration given to the following points:

(1) If the third-party information in the requester's file is truly not "about" him or her, could have no possible adverse effect on the requester, and is not retrieved by the third party's name or personal identifier, a plausible argument might be made (as in DePlanche, Nolan, and Doe) for withholding such information on the ground that it does not constitute an accessible "record" within the meaning of subsections (d)(1) and (a)(4).

(2) If third-party information in the requester's file is also "about" the requester--i.e., a "dual record"--subsections (d)(1) and (a)(4) seem to require release to the requester, for the reasons set forth in Voelker. See 646 F.2d at 333-35. The Act's definition of an accessible "record" does not contain any "exclusiv-

ity" requirement. See Unt v. Aerospace Corp., 765 F.2d 1440, 1450 (9th Cir. 1985) (Ferguson, J., dissenting). However, where release could lead to harassment or harm to the third party, as was the case in DePlanche, see 594 F. Supp. at 693, 696-98, a strong argument for withholding (one that, essentially, is an equitable one) may be possible. Yet, it is significant that the court in Topuridze concluded that the record at issue in that case must be released despite the credible argument that doing so could endanger the author; the court seemed to be no less concerned that such an argument "could be freely invoked by authors of even the most unfounded, defamatory and damaging records." See Topuridze v. USIA, 772 F. Supp. at 666. Furthermore, in light of the court's rejection of the government's more compelling "dual retrieval" argument in Topuridze, it would seem even less likely that the court would permit the withholding of third-party information that was not "dually retrieved," as was the case in DePlanche. Therefore, where DePlanche-type facts are present, agencies should consider use of in camera submissions to justify withholding such third-party information. See, e.g., Patton v. FBI, 626 F. Supp. 445, 447-48 (M.D. Pa. 1985), aff'd, 782 F.2d 1030 (3d Cir. 1986) (unpublished table decision).

(3) If the third-party information in the requester's file is also "about" the requester--i.e., a "dual record"--and the file is also indexed and retrieved by the third party's name or personal identifier--i.e., "dually retrieved," the Topuridze decision suggests that the information should be released to both parties. 772 F. Supp. at 665-66. The court in Topuridze specifically rejected the argument that subsection (b) prohibits disclosure to the requester absent consent of the third party, and it recognized that such a rule would operate to restrict "dual records" from disclosure to anyone other than the agency itself. Id.

A requester need not state his reason for seeking access to records under the Privacy Act, but an agency should verify the identity of the requester in order to avoid violating subsection (b). See OMB Guidelines, 40 Fed. Reg. 28,948, 28,957-58 (1975); see also 5 U.S.C. § 552a(i)(1) (criminal penalties for disclosure of information to parties not entitled to receive it); 5 U.S.C. § 552a(i)(3) (criminal penalties for obtaining records about an individual under false pretenses); cf., e.g., Revised Department of Justice Freedom of Information Act and Privacy Act Regulations, 62 Fed. Reg. 45,184, 45,192 (1997) (to be codified at 28 C.F.R. pt. 16) (proposed August 26, 1997).

Also, note that subsection (d)(1), like the FOIA, "carries no prospective obligation to turn over new documents that come into existence after the date of the request." Crichton v. Community Servs. Admin., 567 F. Supp. 322, 325 (S.D.N.Y. 1983).

INDIVIDUAL'S RIGHT OF AMENDMENT

(1) An individual can request amendment of his own record. 5 U.S.C. § 552a(d)(2).

(2) Ten "working" days after receipt of an amendment request, an agency must acknowledge it in writing and promptly either:

(a) correct any information which the individual asserts is not accurate, relevant, timely, or complete; or

(b) inform the individual of its refusal to amend in accordance with the request, the reason for refusal, and the procedures for administrative appeal. 5 U.S.C. § 552a(d)(2).

(3) The agency must permit an individual who disagrees with its refusal to amend his record to request review of such refusal, and not later than 30 "working" days from the date the individual requests such review, the agency must complete it. If the reviewing official also refuses to amend in accordance with the request, the individual must be permitted to file with the agency a concise statement setting forth the reasons for disagreement with the agency. 5 U.S.C. § 552a(d)(3). The individual's statement of disagreement must be included with any subsequent disclosure of the record. 5 U.S.C. § 552a(d)(4). In addition, where the agency has made prior disclosures of the record and an accounting of those disclosures was made, the agency must inform the prior recipients of the record of any correction or notation of dispute that concerns the disclosed record. 5 U.S.C. § 552a(c)(4).

comment -- For a discussion of subsections (d)(2)-(4), see OMB Guidelines, 40 Fed. Reg. 28,948, 28,958-60 (1975). For a discussion of amendment lawsuits, see the section entitled "Civil Remedies," below.

AGENCY REQUIREMENTS

Each agency that maintains a system of records shall--

A. 5 U.S.C. § 552a(e)(1)

"maintain in its records only such information about an individual as is relevant and necessary to accomplish a purpose of the agency required to be accomplished by statute or by executive order of the President."

comment -- This subsection is not violated so long as the maintenance of the information at issue is relevant and necessary to accomplish a legal purpose of the agency. See, e.g., Reuber v. United States, 829 F.2d 133, 139-40 (D.C. Cir. 1987); National Fed'n of Fed. Employees v. Greenberg, 789 F. Supp. 430, 433-34 (D.D.C. 1992), vacated

& remanded on other grounds, 983 F.2d 286 (D.C. Cir. 1993); Beckette v. United States Postal Serv., No. 88-802, slip op. at 9-10 (E.D. Va. July 3, 1989); NTEU v. IRS, 601 F. Supp. 1268, 1271 (D.D.C. 1985); Chocallo v. Bureau of Hearings & Appeals, 548 F. Supp. 1349, 1368 (E.D. Pa.), aff'd, 716 F.2d 889 (3d Cir. 1983) (unpublished table decision); see also Jones v. United States Dep't of the Treasury, No. 82-2420, slip op. at 2 (D.D.C. Oct. 18, 1983) (ruling that maintenance of record concerning unsubstantiated allegation that BATF Special Agent committed crime was "relevant and necessary"), aff'd, 744 F.2d 878 (D.C. Cir. 1984) (unpublished table decision); OMB Guidelines, 40 Fed. Reg. 28,948, 28,960-61 (1975); 120 Cong. Rec. 40,407 (1974), reprinted in Source Book at 863; cf. American Fed'n of Gov't Employees v. HUD, 118 F.3d 786, 794 (D.C. Cir. 1997) (holding agency use of release form on employment suitability questionnaire constitutional in light of Privacy Act's subsection (e)(1) requirement and "relying on the limitation that the release form authorizes the government to obtain only relevant information used to verify representations made by the employee"); Barlow v. VA, No. 92-16744, slip op. at 3 (9th Cir. Sept. 13, 1993) (VA's request for appellant's medical records did not violate Privacy Act because VA is authorized to request such information and it is "relevant and necessary" to appellant's claim for benefits; citing subsection (e)(1)).

B. 5 U.S.C. § 552a(e)(2)

"collect information to the greatest extent practicable directly from the subject individual when the information may result in adverse determinations about an individual's rights, benefits, and privileges under Federal programs."

comment -- The leading cases under this provision are Waters v. Thornburgh, 888 F.2d 870 (D.C. Cir. 1989), and Brune v. IRS, 861 F.2d 1284 (D.C. Cir. 1988). Waters involved a Justice Department employee whose supervisor became aware of information that raised suspicions concerning the employee's unauthorized use of administrative leave. 888 F.2d at 871-72. Without first approaching the employee for clarification, the supervisor sought and received from a state board of law examiners verification of the employee's attendance at a bar examination. Id. at 872. In finding a violation of subsection (e)(2) on these facts, the Court of Appeals for the District of Columbia Circuit ruled that "[i]n the context of an investigation that is seeking objective, unalterable information, reasonable questions about a subject's credibility cannot relieve an agency from its responsibility to collect that information first from the subject." Id. at 873 (emphasis added); accord Dong v. Smithsonian Inst., 943 F. Supp. 69, 72-73

(D.D.C. 1996) ("concern over Plaintiff's possible reaction to an unpleasant rumor" did not warrant Institution's "fail[ure] to elicit information regarding alleged unauthorized trip directly from her") (appeal pending). The D.C. Circuit in Waters distinguished its earlier decision in Brune, which had permitted an IRS supervisor to contact taxpayers to check on an agent's visits to them without first interviewing the agent, based upon the "special nature of the investigation in that case--possible false statements by an IRS agent" and the concomitant risk that the agent, if contacted first, could coerce the taxpayers to falsify or secret evidence. Waters, 888 F.2d at 874.

Consistent with Brune, two other decisions have upheld the IRS's practice of contacting taxpayers prior to confronting agents who were under internal investigations. See Alexander v. IRS, No. 86-0414, slip op. at 11-14 (D.D.C. June 30, 1987); Merola v. Department of the Treasury, No. 83-3323, slip op. at 5-9 (D.D.C. Oct. 24, 1986).

For other decisions concerning this provision, see Olivares v. NASA, No. 95-2343, 1996 WL 690065, at **2-3 (4th Cir. Dec. 3, 1996), aff'g per curiam 882 F. Supp. 1545 (D. Md. 1995); Hubbard v. United States Envtl. Protection Agency, Adm'r, 809 F.2d 1, 11 n.8 (D.C. Cir.), vacated in nonpertinent part & reh'g en banc granted (due to conflict in circuit), 809 F.2d 1 (D.C. Cir. 1986), resolved on reh'g en banc sub nom. Spagnola v. Mathis, 859 F.2d 223 (D.C. Cir. 1988); Magee v. United States Postal Serv., 903 F. Supp. 1022, 1028-29 (W.D. La. 1995), aff'd, 79 F.3d 1145 (5th Cir. 1996) (unpublished table decision); and Kassel v. VA, 709 F. Supp. 1194, 1203 (D.N.H. 1989). Cf. Beckette v. United States Postal Serv., No. 88-802, slip op. at 10 (E.D. Va. July 3, 1989) (subsection (e)(2) requirements satisfied where information contained in records was derived from other records containing information collected directly from individual). The OMB Guidelines suggest several factors to be evaluated in determining whether it is impractical to contact the subject first. OMB Guidelines, 40 Fed. Reg. 28,948, 28,961 (1975); see also 120 Cong. Rec. 40,407 (1974), reprinted in Source Book at 863.

C. 5 U.S.C. § 552a(e)(3)

"inform each individual whom it asks to supply information, on the form which it uses to collect the information or on a separate form that can be retained by the individual--(A) the authority (whether granted by statute, or by executive order of the President) which authorizes the solicitation of the information and whether disclosure of such information is mandatory or voluntary; (B) the principal purpose or purposes for which the information is intended to be used; (C) the routine uses which may be made of the infor-

mation as published pursuant to paragraph (4)(D) of this subsection; and (D) the effects on him, if any, of not providing all or any part of the requested information."

comment -- The OMB Guidelines note that "[i]mplicit in this subsection is the notion of informed consent since an individual should be provided with sufficient information about the request for information to make an informed decision on whether or not to respond." OMB Guidelines, 40 Fed. Reg. 28,948, 28,961 (1975). The OMB Guidelines also note that subsection (e)(3) is applicable to both written and oral (i.e., interview) solicitations of personal information. Id.

There is some authority for the proposition that subsection (e)(3) is inapplicable when an agency solicits information about an individual from a third party. See Truxal v. Casey, 2 Gov't Disclosure Serv. (P-H) ¶ 81,391, at 82,043 (S.D. Ohio Apr. 3, 1981); see also McTaggart v. United States, 570 F. Supp. 547, 550 (E.D. Mich. 1983) (individual lacks standing to complain of insufficient Privacy Act notice to third party). The OMB Guidelines support this view, but suggest that "agencies should, where feasible, inform third-party sources of the purposes for which information they are asked to provide will be used." OMB Guidelines, 40 Fed. Reg. at 28,961. The practice of not providing notice to third parties was condemned by the Privacy Protection Study Commission, see Privacy Commission Report at 514, and, indeed, several courts have disagreed with Truxal and the OMB Guidelines on this point. See Usher v. Secretary of HHS, 721 F.2d 854, 856 (1st Cir. 1983) (costs awarded to plaintiff due to agency "intransigence" in refusing to provide information specified in subsection (e)(3) to third party); Kassel v. VA, No. 87-217-S, slip op. at 24-25 (D.N.H. Mar. 30, 1992) (in light of "the express language of §(e)(3) and the Privacy Act's overall purposes . . . §(e)(3) applies to information supplied by third-parties"); Saunders v. Schweiker, 508 F. Supp. 305, 309 (W.D.N.Y. 1981) (plain language of subsection (e)(3) "does not in any way distinguish between first-party and third-party contacts").

In Covert v. Harrington, 876 F.2d 751, 755-56 (9th Cir. 1989), a divided panel of the Court of Appeals for the Ninth Circuit held that an agency component's failure to provide actual notice of a routine use under subsection (e)(3)(C), at the time information is submitted, precludes a separate component of the agency (an Inspector General) from later invoking the routine use as a basis for disclosing such information. See also United States Postal Serv. v. National Ass'n of Letter Carriers, 9 F.3d 138, 146 (D.C. Cir. 1993) (citing Covert with approval and re-

manding case for factual determination as to whether (e)(3)(C) notice was given). But see OMB Guidelines at 28,961-62 ("It was not the intent of [subsection (e)(3)] to create a right the nonobservance of which would preclude the use of the information or void an action taken on the basis of that information.").

It has been held that "[n]othing in the Privacy Act requires agencies to employ the exact language of the statute to give effective notice." United States v. Wilber, 696 F.2d 79, 80 (8th Cir. 1982); see also Field v. Brown, 610 F.2d 981, 986-88 (D.C. Cir. 1979); Glasgold v. Secretary of HHS, 558 F. Supp. 129, 149-51 (E.D.N.Y. 1982). Thus, for example, subsection (e)(3)(D) does not require an agency to provide notice of the specific criminal penalty which may be imposed for failure to provide information. See, e.g., United States v. Bressler, 772 F.2d 287, 292-93 (7th Cir. 1985); United States v. Bell, 734 F.2d 1315, 1318 (8th Cir. 1984) (per curiam); United States v. Annunziato, 643 F.2d 676, 678 (9th Cir. 1981); United States v. Rickman, 638 F.2d 182, 183 (10th Cir. 1980); United States v. Gillotti, 822 F. Supp. 984, 988 (W.D.N.Y. 1993); see also United States v. Bishop, No. 90-4077, slip op. at 7 (6th Cir. Oct. 23, 1991) (citing Bressler and holding that IRS form 1040 instruction booklet informing taxpayers of obligation to file return or statement with IRS is sufficient notice under Privacy Act); Beller v. Middendorf, 632 F.2d 788, 798-99 n.6 (9th Cir. 1980); Field, 610 F.2d at 987 (requirements of Privacy Act satisfied where Privacy Act statement provided that failure to provide information would result in "notification to the Department of Justice" for appropriate action).

D. 5 U.S.C. § 552a(e)(4)

"[subject to notice and comment], publish in the Federal Register upon establishment or revision a notice of the existence and character of the system of records, which notice shall include--(A) the name and location of the system; (B) the categories of individuals on whom records are maintained in the system; (C) the categories of records maintained in the system; (D) each routine use of the records contained in the system, including the categories of users and the purpose of such use; (E) the policies and practices of the agency regarding storage, retrievability, access controls, retention, and disposal of the records; (F) the title and business address of the agency official who is responsible for the system of records; (G) the agency procedures whereby an individual can be notified at his request if the system of records contains a record pertaining to him; (H) the agency procedures whereby an individual can be notified at his request how he can gain access to any record pertaining to him contained in the system of records, and how he can contest its contents; and (I) the categories of sources of records in the system."

comment -- For a discussion of this provision, see OMB Guidelines, 40 Fed. Reg. 28,948, 28,962-64 (1975). Although Privacy Act system notices are spread throughout the Federal Register, the Office of the Federal Register publishes a biennial compilation of all such system notices. See 5 U.S.C. § 552a(f). This "Privacy Act Compilation," is now available at the Government Printing Office's World Wide Web site, which can be found at http://www.access.gpo.gov/su_docs.

E. 5 U.S.C. § 552a(e)(5)

"maintain all records which are used by the agency in making any determination about any individual with such accuracy, relevance, timeliness, and completeness as is reasonably necessary to assure fairness to the individual in the determination."

comment -- This provision (along with subsections (e)(1) and (e)(7)) sets forth the standard to which records must conform in the context of an amendment lawsuit, as well as in the context of an accuracy lawsuit for damages. See 5 U.S.C. § 552a(g)(1)(A); 5 U.S.C. § 552a(g)(1)(C). As the Court of Appeals for the District of Columbia Circuit has held, "whether the nature of the relief sought is injunctive or monetary, the standard against which the accuracy of the record is measured remains constant [and] that standard is found in 5 U.S.C. § 552a(e)(5) and reiterated in 5 U.S.C. § 552a(g)(1)(C)." Doe v. United States, 821 F.2d 694, 697 n.8 (D.C. Cir. 1987) (en banc).

In theory, a violation of this provision (or any other part of the Act) could also give rise to a damages action under 5 U.S.C. § 552a(g)(1)(D). Cf. Perry v. FBI, 759 F.2d 1271, 1275 (7th Cir. 1985), rev'd en banc on other grounds, 781 F.2d 1294 (7th Cir. 1986). However, the Court of Appeals for the District of Columbia Circuit has held that "a plaintiff seeking damages for noncompliance with the standard set out in subsection (e)(5) must sue under subsection (g)(1)(C) and not subsection (g)(1)(D)." Deters v. United States Parole Comm'n, 85 F.3d 655, 660-61 & n.5 (D.C. Cir. 1996) (noting that although court had suggested in Dickson v. OPM, 828 F.2d 32, 39 (D.C. Cir. 1987), "that subsection (g)(1)(D) could cover a violation of subsection (e)(5), the holding in that case is limited to the scope of subsection (g)(1)(C)").

Perfect records are not required by subsection (e)(5); instead, "reasonableness" is the standard. See Johnston v. Horne, 875 F.2d 1415, 1421 (9th Cir. 1989); DeBold v. Stimson, 735 F.2d 1037, 1041 (7th Cir. 1984); Edison v. Department of the Army, 672 F.2d 840, 843 (11th Cir. 1982); Vymetalik v. FBI, No. 82-3495, slip op. at 3-5 (D.D.C. Jan. 30, 1987); Marcotte v. Secretary of

Defense, 618 F. Supp. 756, 762 (D. Kan. 1985); Smiertka v. United States Dep't of the Treasury, 447 F. Supp. 221, 225-26 & n.35 (D.D.C. 1978), remanded on other grounds, 604 F.2d 698 (D.C. Cir. 1979); see also, e.g., Halus v. United States Dep't of the Army, No. 87-4133, slip op. at 17 (E.D. Pa. Aug. 15, 1990) (erroneous information held not subject to amendment if it is merely a "picayune" and immaterial error); Jones v. United States Dep't of the Treasury, No. 82-2420, slip op. at 2-3 (D.D.C. Oct. 18, 1983) (ruling it reasonable for agency--without conducting its own investigation--to maintain record concerning unsubstantiated allegation of sexual misconduct by BATF agent conveyed to it by state and local authorities), aff'd, 744 F.2d 878 (D.C. Cir. 1984) (unpublished table decision); cf. Sullivan v. Federal Bureau of Prisons, No. 94-5218, 1995 WL 66711, at *1 (D.C. Cir. Jan. 17, 1995) (even if (e)(5) claim were not time-barred, "Parole Commission met the requirements of the Act by providing [plaintiff] with a parole revocation hearing at which he was represented by counsel and given the opportunity to refute the validity of his continued confinement"); Smith v. United States Bureau of Prisons, No. 94-1798, 1996 WL 43556, at **3-4 (D.D.C. Jan. 31, 1996) (finding that plaintiff's record was not inaccurate with respect to his pre-commitment status in light of Bureau of Prisons' "full authority to promulgate rules governing the treatment and classification of prisoners" and "broad discretionary power," and because there was "no evidence that the BOP's interpretation of its own regulations was an abuse of discretion or discriminatorily administered," "BOP officials reconsidered their decision at least once," and "the determination of which plaintiff complains ha[d] been resolved in his favor"); Hampton v. FBI, No. 93-0816, slip op. at 3-6, 13-17 (D.D.C. June 30, 1995) (although not mentioning (e)(5), finding that FBI "acted lawfully under the Privacy Act in the maintenance of the plaintiff's arrest record" when FBI refused to expunge challenged entries of arrests that did not result in conviction absent authorization by local law enforcement agencies that had originally submitted the information); Buxton v. United States Parole Comm'n, 844 F. Supp. 642, 644 (D. Or. 1994) (subsection (e)(5) fairness standard satisfied where Parole Commission complied with statutory procedures regarding parole hearings even though it did not investigate or correct alleged inaccuracies in presentence report).

Erroneous facts--as well as opinions, evaluations, and subjective judgments based entirely on erroneous facts--can be amended. See, e.g., Hewitt v. Grabicki, 794 F.2d 1373, 1378 (9th Cir. 1986); Douglas v. Farmers Home Admin., 778 F. Supp. 584, 585 (D.D.C. 1991); Rodgers v. De-

partment of the Army, 676 F. Supp. 858, 860-61 (N.D. Ill. 1988); Ertell v. Department of the Army, 626 F. Supp. 903, 910-12 (C.D. Ill. 1986); R.R. v. Department of the Army, 482 F. Supp. 770, 773-74 (D.D.C. 1980); Murphy v. NSA, 2 Gov't Disclosure Serv. (P-H) ¶ 81,389, at 82,036 (D.D.C. Sept. 29, 1981); Trinidad v. United States Civil Serv. Comm'n, 2 Gov't Disclosure Serv. (P-H) ¶ 81,322, at 81,870-71 (N.D. Ill. Apr. 7, 1980); Turner v. Department of the Army, 447 F. Supp. 1207, 1213 (D.D.C. 1978), aff'd, 593 F.2d 1372 (D.C. Cir. 1979). As the Court of Appeals for the Seventh Circuit has noted, "[t]he Privacy Act merely requires an agency to attempt to keep accurate records, and provides a remedy to a claimant who demonstrates that facts underlying judgments contained in his records have been discredited." DeBold, 735 F.2d at 1040-41.

In addition, one court has held that where records contain disputed hearsay and reports from informants and unnamed parties, "the records are maintained with adequate fairness if they accurately reflect the nature of the evidence" (i.e., indicate that the information is a hearsay report from an unnamed informant). Graham v. Hawk, 857 F. Supp. 38, 40 (W.D. Tenn. 1994), aff'd, 59 F.3d 170 (6th Cir. 1995) (unpublished table decision); cf. Hass v. United States Air Force, 848 F. Supp. 926, 931 (D. Kan. 1994) (although acknowledging possibility that agency relied upon incorrect information in making determination about plaintiff, finding no Privacy Act violation because no evidence was suggested that information was recorded inaccurately).

As a general rule, courts are reluctant to disturb judgmental matters in an individual's record when such judgments are based on a number of factors or when the factual predicates for a judgment or evaluation are diverse. As the D.C. Circuit has ruled, where a subjective evaluation is "based on a multitude of factors" and "there are various ways of characterizing some of the underlying [factual] events," it is proper to retain and rely on the record. White v. OPM, 787 F.2d 660, 662 (D.C. Cir. 1986); see also Webb v. Magaw, 880 F. Supp. 20, 25 (D.D.C. 1995) (records were not based on demonstrably false premise, but rather on subjective evaluation "`based on a multitude of factors'" (quoting White, 787 F.2d at 662)); Bernson v. ICC, 625 F. Supp. 10, 13 (D. Mass. 1984) (court cannot order amendment of opinions "to reflect the plaintiffs' version of the facts"); cf. Phillips v. Widnall, No. 96-2099, 1997 WL 176394, at **2-3 (10th Cir. Apr. 14, 1997) (although not mentioning (e)(5), holding that appellant was not entitled to court-ordered amendment, nor award of damages, concerning record in her medical files that contained "physician's notation to the ef-

fect that [appellant] was probably dependent upon a prescription medication," as such notation "reflected the physician's medical conclusion, which he based upon a number of objective factors and [appellant's] own complaints of neck and low back pain," and "Privacy Act does not permit a court to alter documents that accurately reflect an agency decision, no matter how contestable the conclusion may be").

Many courts have held that pure opinions and judgments are not subject to amendment. See, e.g., Hewitt, 794 F.2d at 1378-79; Blevins v. Plummer, 613 F.2d 767, 768 (9th Cir. 1980) (per curiam); Gowan v. Department of the Air Force, No. 90-94, slip op. at 28-30 (D.N.M. Sept. 1, 1995) (appeal pending); Webb, 880 F. Supp. at 25; Linneman v. FBI, No. 89-505, slip op. at 14 (D.D.C. July 13, 1992); Nolan v. United States Dep't of Justice, No. 89-A-2035, slip op. at 4-5 (D. Colo. July 17, 1991), appeal dismissed in pertinent part on procedural grounds, 973 F.2d 843 (10th Cir. 1992); Frobish v. United States Army, 766 F. Supp. 919, 926-27 (D. Kan. 1991); Daigneau v. United States, No. 88-54-D, slip op. at 3-4 (D.N.H. July 8, 1988); Brumley v. United States Dep't of Labor, No. LR-C-87-437, slip op. at 4 (E.D. Ark. June 15, 1988), aff'd, 881 F.2d 1081 (8th Cir. 1989) (unpublished table decision); Tannehill v. United States Dep't of the Air Force, No. 87-M-1395, slip op. at 2 (D. Colo. May 23, 1988); Rogers v. United States Dep't of Labor, 607 F. Supp. 697, 699-700 (N.D. Cal. 1985); Fagot v. FDIC, 584 F. Supp. 1168, 1176 (D.P.R. 1984), aff'd in part & rev'd in part, 760 F.2d 252 (1st Cir. 1985) (unpublished table decision); DeSha v. Secretary of the Navy, 3 Gov't Disclosure Serv. (P-H) ¶ 82,496, at 82,251 (C.D. Cal. Feb. 26, 1982), aff'd, 780 F.2d 1025 (9th Cir. 1985) (unpublished table decision); Lee v. United States Dep't of Labor, 2 Gov't Disclosure Serv. (P-H) ¶ 81,335, at 81,891 (D. Va. Apr. 17, 1980); Hacopian v. Marshall, 2 Gov't Disclosure Serv. (P-H) ¶ 81,312, at 81,856 (C.D. Cal. Apr. 16, 1980); Castle v. United States Civil Serv. Comm'n, No. 77-1544, slip op. at 5 (D.D.C. Jan. 23, 1979); Rowe v. Department of the Air Force, No. 3-77-220, slip op. at 5 (E.D. Tenn. Mar. 20, 1978); cf. Turner, 447 F. Supp. at 1212-13 (where negative rating had been expunged, court declined to add its opinion about quality of plaintiff's service).

In determining what steps an agency must take in order to satisfy the accuracy standard of subsection (e)(5), the Court of Appeals for the District of Columbia Circuit has looked to whether the information at issue is capable of being verified. In Doe v. United States, 821 F.2d at 697-701, the D.C. Circuit, sitting en banc, in a seven-to-four decision, held that the inclusion in a job applicant's record of both

the applicant's and agency interviewer's conflicting versions of an interview (in which only they were present) satisfies subsection (e)(5)'s requirement of maintaining reasonably accurate records. The D.C. Circuit, in rejecting the argument that the agency and reviewing court must themselves make a credibility determination of which version of the interview to believe, ruled that subsections (e)(5) and (g)(1)(C) "establish as the record-keeper's polestar, `fairness' to the individual about whom information is gathered," and that "the `fairness' criterion does not demand a credibility determination in the atypical circumstances of this case." Id. at 699 (emphasis added); see also Harris v USDA, No. 96-5783, 1997 U.S. App. LEXIS 22839, at **4-8 (6th Cir. Aug. 26, 1997) (agency "reasonably excluded" information from plaintiff's record where there was "substantial evidence that the [information] was unreliable," and in absence of "verifiable information which contradicted its investigators' records," agency "reasonably kept and relied on the information gathered by its investigators when it terminated plaintiff"); Graham, 857 F. Supp. at 40 (agency under no obligation to resolve whether hearsay contained in report is true, so long as information characterized as hearsay); Doe v. FBI, No. 91-1252, slip op. at 6-7 (D.N.J. Feb. 27, 1992) (following Doe v. United States, 821 F.2d at 699, and holding that FBI fulfilled its obligations under Privacy Act by including plaintiff's objections to statements contained in FBI polygrapher's memorandum and by verifying to extent possible that polygraph properly conducted).

Subsequently, the D.C. Circuit held that in a "typical" case, where the records at issue are "not ambivalent" and the facts described therein are "susceptible of proof," the agency and reviewing court must determine accuracy as to each filed item of information. Strang v. United States Arms Control & Disarmament Agency, 864 F.2d 859, 866 (D.C. Cir. 1989). In order to "assure fairness" and render the record "complete" under subsection (e)(5), an agency may even be required to include contrary or qualifying information. See Strang v. United States Arms Control & Disarmament Agency, 920 F.2d 30, 32 (D.C. Cir. 1990); Kassel v. VA, 709 F. Supp. 1194, 1204-05 (D.N.H. 1989).

More recently, the D.C. Circuit adhered to its holding in Strang and held:

> As long as the information contained in an agency's files is capable of being verified, then, under sections (e)(5) and (g)(1)(C) of the Act, the agency must take reasonable steps to maintain the accuracy of the information to assure fairness to the indi-

> vidual. If the agency wilfully or intentionally fails to maintain its records in that way and, as a result, it makes a determination adverse to an individual, then it will be liable to that person for money damages. . . . [T]he agency did not satisfy the requirements of the Privacy Act simply by noting in [the individual's] files that he disputed some of the information the files contained.

Sellers v. Bureau of Prisons, 959 F.2d 307, 312 (D.C. Cir. 1992). (It is worth noting that Sellers was solely a subsection (e)(5)/(g)(1)(C) case; the system of records at issue was exempt from subsection (d).) See also Griffin v. United States Parole Comm'n, No. 97-5084, 1997 U.S. App. LEXIS 22401, at **3-5 (D.C. Cir. July 16, 1997) (citing Doe and Deters and finding itself presented with "typical" case in which information was capable of verification, and therefore vacating district court opinion that had characterized case as "atypical"), vacating & remanding No. 96-0342, 1997 U.S. Dist. LEXIS 2846 (D.D.C. March 11, 1997); Deters, 85 F.3d at 658-59 (quoting Sellers and Doe, and although finding itself presented with "an atypical case because the `truth' . . . is not readily ascertainable . . . assum[ing] without concluding that the Commission failed to maintain Deters's records with sufficient accuracy" because Commission had "not argued that this was an atypical case"); Bayless v. United States Parole Comm'n, No. 94CV0686, 1996 WL 525325, at *5 (D.D.C. Sept. 11, 1996) (citing Sellers and Doe and finding itself presented with an "atypical" case because "truth concerning plaintiff[']s culpability in the conspiracy and the weight of drugs attributed to him involves credibility determinations of trial witnesses and government informants and, therefore, is not `clearly provable'"); Webb, 880 F. Supp. at 25 (finding that record at issue contained "justified statements of opinion, not fact" and "[c]onsequently, they were not `capable of being verified' as false and cannot be considered inaccurate statements" (quoting Sellers, 959 F.2d at 312, and citing Doe, 821 F.2d at 699)); Thomas v. United States Parole Comm'n, No. 94-0174, slip op. at 7-12 (D.D.C. Sept. 7, 1994) (discussing Doe, Strang, and Sellers, but finding that Parole Commission "verified the external `verifiable' facts"; further holding that plaintiff should not be allowed to use Privacy Act "to collaterally attack the contents of his presentence report," as he "originally had the opportunity to challenge the accuracy . . . before the judge who sentenced him"); Linneman, No. 89-505, slip op. at 11-22 (D.D.C. July 13, 1992) (applying Sellers and Doe to variety of items of which plaintiff sought amendment).

The D.C. Circuit recently noted that where "an agency has no subsection (d) duty to amend, upon request, it is not clear what residual duty subsection (e)(5) imposes when an individual challenges the accuracy of a record." Deters, 85 F.3d at 658 n.2. It went on to question whether subsection (e)(5) would still require an agency to amend or expunge upon the individual's request, or whether the agency merely must "address the accuracy of the records at some point before using it to make a determination of consequence to the individual." Id. Although stating that the Sellers opinion was "not entirely clear on this point," the D.C. Circuit reasoned that "the language of subsection (e)(5) . . . suggests the latter course," id. (citing OMB Guidelines, 40 Fed. Reg. 28,948, 28,964 (1975)), and went on to state that subsection (e)(5) suggests that an agency has "no duty to act on an [individual's] challenge and verify his record until the agency uses the record in making a determination affecting his rights, benefits, entitlements or opportunities," 85 F.3d at 660; see also Bayless, 1996 WL 525325, at *6 n.19 (quoting Deters and determining that agency "fulfilled its requisite duty by `addressing' plaintiff's allegations prior to rendering a parole determination").

The Court of Appeals for the Ninth Circuit has held that an agency can comply with subsection (e)(5) by simply including a complainant's rebuttal statement with an allegedly inaccurate record. Fendler v. United States Bureau of Prisons, 846 F.2d 550, 554 (9th Cir. 1988) (subsections (e)(5) and (g)(1)(C) lawsuit); see also Graham, 857 F. Supp. at 40 (citing Fendler and holding that where individual disputes accuracy of information that agency has characterized as hearsay, agency satisfies (e)(5) by permitting individual to place rebuttal in file); cf. Harris, No. 96-5783, 1997 U.S. App. LEXIS 22839, at **6-7 (6th Cir. Aug. 26, 1997) (although holding that exclusion of information from appellant's record due to unreliability of information was reasonable, finding it "notabl[e]" that appellant had not contested district court's finding that agency "did not prevent him from adding to the file his disagreement with the [agency] investigators' conclusions"). Fendler thus appears to conflict with both Doe and Strang, as well as with the D.C. Circuit's earlier decision in Vymetalik v. FBI, 785 F.2d 1090, 1098 n.12 (D.C. Cir. 1986) (noting that subsection (d)(2) "guarantees an individual the right to demand that his or her records be amended if inaccurate" and that mere inclusion of rebuttal statement was not "intended to be [the] exclusive [remedy]").

In Chapman v. NASA, 682 F.2d 526, 528-30 (5th Cir. 1982), the Court of Appeals for the Fifth

Circuit recognized a "timely incorporation" duty under subsection (e)(5). It ruled that a supervisor's personal notes "evanesced" into Privacy Act records when they were used by the agency to effect an adverse disciplinary action, and that such records must be placed into the employee's file "at the time of the next evaluation or report on the employee's work status or performance." Id. at 529. In reversing the district court's ruling that such notes were not records within a system of records, the Fifth Circuit noted that such incorporation ensures fairness by allowing employees a meaningful opportunity to make refutatory notations, and avoids an "ambush" approach to maintaining records. Id.; see also Thompson v. Department of Transp. United States Coast Guard, 547 F. Supp. 274, 283-84 (S.D. Fla. 1982) (explaining Chapman). Chapman's "timely incorporation" doctrine has been followed in several other cases. See, e.g., MacDonald v. VA, No. 87-544-CIV-T-15A, slip op. at 2-5 (M.D. Fla. Feb. 8, 1988) (counseling memorandum used in preparation of proficiency report "became" part of VA system of records); Lawrence v. Dole, No. 83-2876, slip op. at 5-6 (D.D.C. Dec. 12, 1985) (notes not incorporated in timely manner cannot be used as basis for adverse employment action); Waldrop v. United States Dep't of the Air Force, 3 Gov't Disclosure Serv. (P-H) ¶ 83,016, at 83,453 (S.D. Ill. Aug. 5, 1981) (certain of records at issue became Privacy Act records; others were merely "memory joggers"); Nelson v. EEOC, No. 83-C-983, slip op. at 6-11 (E.D. Wis. Feb. 14, 1984) (memorandum was used in making determination about an individual and therefore must be included in system of records and made available to individual); cf. Manuel v. VA Hosp., 857 F.2d 1112, 1117-19 (6th Cir. 1988) (no duty to place records within system of records where records "are not part of an official agency investigation into activities of the individual requesting the records, and where the records requested do not have an adverse effect on the individual"); Magee v. United States, 903 F. Supp. 1022, 1029-30 (W.D. La. 1995) (plaintiff's file kept in supervisor's desk, separate from other employee files, because of plaintiff's concerns about access to it and with plaintiff's acquiescence did "not fall within the proscriptions of maintaining a `secret file' under the Act"), aff'd, 79 F.3d 1145 (5th Cir. 1996) (unpublished table decision).

Also note that subsection (e)(5)'s "timeliness" requirement does not require that agency records contain only information that is "hot off the presses." White, 787 F.2d at 663 (rejecting argument that use of year-old evaluation violates Act, as it "would be an unwarranted intrusion on the agency's freedom to shape employment application procedures"); see also Beckette

v. United States Postal Serv., No. 88-802, slip op. at 12-14 (E.D. Va. July 3, 1989) (stating that "[a]ll of the record maintenance requirements of subsection 552a(e)(5), including timeliness, concern fairness," and finding that as to records regarding "restricted sick leave," "[w]iping the . . . slate clean after an employee has remained off the listing for only six months is not required to assure fairness to the individual"; also finding that maintenance of those records for six months after restricted sick leave had been rescinded "did not violate the relevancy requirement of subsection 552a(e)(5)").

For a further discussion of subsection (e)(5), see OMB Guidelines, 40 Fed. Reg. 28,948, 28,964-65 (1975).

F. 5 U.S.C. § 552a(e)(6)

"prior to disseminating any record about an individual to any person other than an agency, unless the dissemination is made pursuant to subsection (b)(2) of this section [FOIA], make reasonable efforts to assure that such records are accurate, complete, timely, and relevant for agency purposes."

comment -- This provision requires a reasonable effort by the agency to review records prior to their dissemination. See NTEU v. IRS, 601 F. Supp. 1268, 1272 (D.D.C. 1985); see also Gang v. Civil Serv. Comm'n, No. 76-1263, slip op. at 2-5 (D.D.C. May 10, 1977) (provision violated where agency failed to review personnel file to determine relevance and timeliness of dated material concerning political activities before disseminating it to Library of Congress).

The District Court for the District of Columbia recently held that an agency was not liable under subsection (e)(6) for damages for the dissemination of information that plaintiff had claimed was inaccurate but that the court determined consisted of statements of opinion and subjective evaluation that were not subject to amendment. Webb v. Magaw, 880 F. Supp. 20, 25 (D.D.C. 1995).

By its terms, this provision does not apply to mandatory FOIA disclosures. See Smith v. United States, 817 F.2d 86, 87 (10th Cir. 1987); Kassel v. VA, 709 F. Supp. 1194, 1205 & n.5 (D.N.H. 1989); see also OMB Guidelines, 40 Fed. Reg. 28,948, 28,965 (1975).

G. 5 U.S.C. § 552a(e)(7)

"maintain no record describing how any individual exercises rights guaranteed by the First Amendment unless expressly authorized by statute or by the individual about whom the

record is maintained or unless pertinent to and within the scope of an authorized law enforcement activity."

comment -- The OMB Guidelines advise agencies in determining whether a particular activity constitutes exercise of a right guaranteed by the First Amendment to "apply the broadest reasonable interpretation." 40 Fed. Reg. 28,948, 28,965 (1975); see also 120 Cong. Rec. 40,406 (1974), reprinted in Source Book at 860. As noted above, Albright v. United States, 631 F.2d 915, 918-20 (D.C. Cir. 1980), establishes that the record at issue need not be within a system of records to violate subsection (e)(7); see also MacPherson v. IRS, 803 F.2d 479, 481 (9th Cir. 1986); Boyd v. Secretary of the Navy, 709 F.2d 684, 687 (11th Cir. 1983) (per curiam); Clarkson v. IRS, 678 F.2d 1368, 1373-77 (11th Cir. 1982). See also discussion under "System of Records" definition, above.

However, the record at issue "must implicate an individual's First Amendment rights." Boyd, 709 F.2d at 684; accord Banks v. Garrett, 901 F.2d 1084, 1089 (Fed. Cir. 1990); see also Reuber v. United States, 829 F.2d 133, 142-43 (D.C. Cir. 1987) (noting threshold requirement that record itself must describe First Amendment-protected activity); Pototsky v. Department of the Navy, 717 F. Supp. 20, 22 (D. Mass. 1989) (same), aff'd, 907 F.2d 142 (1st Cir. 1990) (unpublished table decision). Thus, subsection (e)(7) is not triggered in the first place unless the record describes First Amendment-protected activity. See, e.g., England v. Commissioner, 798 F.2d 350, 352-53 (9th Cir. 1986) (record identifying individual as having "tax protester" status does not describe how individual exercises First Amendment rights); Weeden v. Frank, No. 1:91CV0016, slip op. at 7-8 (N.D. Ohio Apr. 10, 1992) (to read subsection (e)(7) as requiring privacy waiver for agency to even file plaintiff's request for religious accommodation is "a broad and unreasonable interpretation of subsection (e)(7)"; however, agency would need to obtain waiver to collect information to verify plaintiff's exercise of religious beliefs), aff'd, 16 F.3d 1223 (6th Cir. 1994) (unpublished table decision); Cloud v. Heckler, 3 Gov't Disclosure Serv. (P-H) ¶ 83,230, at 83,962 (W.D. Ark. Apr. 21, 1983) (maintenance of employee's letters criticizing agency--written while on duty--does not violate subsection (e)(7) because "[p]oor judgment is not protected by the First Amendment").

Assuming that the challenged record itself describes activity protected by the First Amendment, subsection (e)(7) is violated unless maintenance of the record is:

(1) expressly authorized by statute, see, e.g., Abernethy v. IRS, 909 F. Supp. 1562, 1570 (N.D. Ga. 1995) (IRS "authorized by statute" to maintain copies of documents relevant to processing of plaintiff's requests under FOIA and Privacy Act, which both "provide implied authorization to federal agencies to maintain copies for their own records of the documents which are released to requesters under those Acts"), aff'd, No. 95-9489 (11th Cir. Feb. 13, 1997); Hass v. United States Air Force, 848 F. Supp. 926, 930-31 (D. Kan. 1994) (agency's maintenance of FOIA and PA requests "cannot logically violate the Privacy Act"); Attorney Gen. of the United States v. Irish N. Aid Comm., No. 77-708, slip op. at 7 (S.D.N.Y. Oct. 7, 1977) (Foreign Agents Registration Act); OMB Guidelines, 40 Fed. Reg. at 28,965 (Immigration and Nationality Act); cf. Abernethy, 909 F. Supp. at 1570 (maintenance of documents in congressional communications files "does not violate the Privacy Act" because IRS "must respond to Congressional inquiries" and maintenance was necessary to carry out that responsibility (citing Internal Revenue Manual 1(15)29, Chapter 500, Congressional Communications)); Gang v. United States Civil Serv. Comm'n, No. 76-1263, slip op. at 5-7 & n.5 (D.D.C. May 10, 1977) (recognizing that 5 U.S.C. § 7311, which prohibits individual from holding position with federal government if he advocates--or is member of organization that he knows advocates--overthrow of government, may be read together with subsection (e)(7) as permitting maintenance of files relating to membership in such groups, but ruling that "it cannot fairly be read to permit wholesale maintenance of all materials relating to political beliefs, association, and religion"; nor does 5 U.S.C. § 3301, which authorizes President to ascertain fitness of federal applicants for employment as to character, provide authorization for maintenance of such information); or

(2) expressly authorized by the individual about whom the record is maintained, see Abernethy, 909 F. Supp. at 1570 ("Plaintiff authorized the maintenance of the documents at issue by submitting copies to various components of the Defendant IRS."); OMB Guidelines, 40 Fed. Reg. at 28,965 ("volunteered" information is properly maintained); see also Radford v. Social Sec. Admin., No. 81-4099, slip op. at 4-5 (D. Kan. July 11, 1985) (plaintiff's publication of contents of offending record does not constitute "express authorization"); Murphy v. NSA, 2 Gov't Disclosure Serv. (P-H) ¶ 81,389, at 82,036 (D.D.C. Sept. 29, 1981) (consent to maintain may be withdrawn); cf. Weeden v. Frank, No. 93-3681, 1994 WL 47137, at *2 (6th Cir. Feb. 16, 1994) (Postal Service's procedure requiring individual to expressly waive subsection (e)(7) Privacy Act rights in order to allow agency to collect in-

formation regarding employee's exercise of religious beliefs so that accommodation could be established held not unreasonable); or

(3) pertinent to and within the scope of an authorized law enforcement activity.

Perhaps the leading precedent in the early case law on the "law enforcement activity" exception is Patterson v. FBI, 893 F.2d 595, 602-03 (3d Cir. 1990), a case that attracted national media attention because of its unusual factual background: An elementary school student who, in the lawful exercise of his constitutional rights to write an encyclopedia of the world based upon requests to 169 countries for information, became the subject of an FBI national security investigation. The Court of Appeals for the Third Circuit, in affirming the dismissal of the student's subsection (e)(7) claim, ruled that a standard of "relevance" to a lawful law enforcement activity is "more consistent with Congress's intent and will prove to be a more manageable standard than employing one based on ad-hoc review." Id. at 603.

The "relevance" standard articulated in Patterson had earlier been recognized by the Court of Appeals for the Sixth Circuit in Jabara v. Webster, 691 F.2d 272, 279-80 (6th Cir. 1982), a case involving a challenge to the FBI's maintenance of investigative records regarding surveillance of the plaintiff's overseas communications. In Jabara, the Sixth Circuit vacated as "too narrow" the district court's ruling that the exception is limited to "investigation of past, present or future criminal activity." Id. It held that the exception applies where the record is "relevant to an authorized criminal investigation or to an authorized intelligence or administrative one." Id. at 280.

In MacPherson v. IRS, 803 F.2d at 482-85, the Court of Appeals for the Ninth Circuit ruled that the applicability of the exception could be assessed only on an "individual, case-by-case basis" and that a "hard and fast standard" was inappropriate. On the facts before it, however, the Ninth Circuit upheld the maintenance of notes and purchased tapes of a tax protester's speech as "necessary to give the IRS [and Justice Department] a complete and representative picture of the events," notwithstanding that no investigation of a specific violation of law was involved and no past, present or anticipated illegal conduct was revealed or even suspected. Id. The Ninth Circuit cautioned, though, that its holding was a narrow one tied to the specific facts before it. Id. at 485 n.9.

In Clarkson v. IRS, 678 F.2d at 1374-75--a case involving facts similar to MacPherson in that it

likewise involved a challenge to the IRS's maintenance of records regarding surveillance of a tax protester's speech--the Court of Appeals for the Eleventh Circuit quoted with approval the standard set forth by the district court decision in Jabara (subsequently vacated and remanded by the Sixth Circuit) and held that the exception does not apply if the record is "unconnected to any investigation of past, present or anticipated violations of statutes [the agency] is authorized to enforce." On remand, the district court upheld the IRS's maintenance of the surveillance records as "connected to anticipated violations of the tax statutes" inasmuch as such records "provide information relating to suggested methods of avoiding tax liability" and aid in the "identification of potential tax violators." Clarkson v. IRS, No. C79-642A, slip op. at 6-10 (N.D. Ga. Dec. 27, 1984), aff'd per curiam, 811 F.2d 1396 (11th Cir. 1987); accord Tate v. Bindseil, 2 Gov't Disclosure Serv. (P-H) ¶ 82,114, at 82,427 (D.S.C. Aug. 4, 1981) ("[An] IRS investigation of activist organizations and individuals prominently associated with those organizations which advocate resistance to the tax laws by refusing to file returns or filing blank returns is a legitimate law enforcement activity.").

The Court of Appeals for the Seventh Circuit, although recognizing the "varying views" adopted by other courts of appeals, adopted what seems to be the most strict application of the law enforcement exception to date. The Seventh Circuit ordered the IRS to expunge information in a closed investigative file, based upon its determination, through in camera inspection, that it could not "be helpful in future enforcement activity." Becker v. IRS, 34 F.3d 398, 408-09 (7th Cir. 1994); cf. J. Roderick MacArthur Found. v. FBI, 102 F.3d 600, 607 (D.C. Cir. 1996) (Tatel, J., dissenting) (opining in favor of requirement that information be maintained only if pertinent to current law enforcement activity), petition for cert. filed sub nom. Lindblom v. FBI, 66 U.S.L.W. 3107 (U.S. July 10, 1997) (No. 97-82). In so ruling, the Seventh Circuit appeared to confusingly engraft the timeliness requirement of subsection (e)(5) onto subsection (e)(7). See Becker, 34 F.3d at 409 & n.28. Additionally, the Seventh Circuit appeared to confuse the district court's determination that the information was exempt from access under subsection (k)(2) with the district court's further ruling that the information also satisfied the requirements of subsection (e)(7). See id. at 407-08; see also Becker v. IRS, No. 91 C 1203, slip op. at 5-6 (N.D. Ill. Apr. 13, 1993); cf. MacArthur, 102 F.3d at 603 (stating in majority opinion that Seventh Circuit in Becker "appears to have confused § 552a(e)(7) with § 552a(k)(2)").

Recently, the Court of Appeals for the District of Columbia Circuit was faced with interpreting the law enforcement exception in J. Roderick MacArthur Foundation v. FBI, 102 F.3d 600 (D.C. Cir. 1996), petition for cert. filed sub. nom Lindblom v. FBI, 66 U.S.L.W. 3107 (U.S. July 10, 1997) (No. 97-82). In MacArthur, the D.C. Circuit rejected the appellants' arguments, which were based on Becker, stating that "the court's analysis of § (e)(7) in Becker is neither clear nor compelling," and that the Seventh Circuit had "set out to determine the meaning `of the "law enforcement purpose" phrase of § 552a(e)(7)' not realizing that the phrase used in the Privacy Act is `authorized law enforcement activity'" and that it "appears to have confused § 552a(e)(7) with § 552a(k)(2)." 102 F.3d at 603. In MacArthur, the appellant did not challenge the FBI's having collected the information about him, but rather claimed that the FBI could not maintain or retain such information unless there was a "current law enforcement necessity to do so." Id. at 602. The D.C. Circuit, however, realizing that "[m]aterial may continue to be relevant to a law enforcement activity long after a particular investigation undertaken pursuant to that activity has been closed," id. at 602-03, ruled that "[i]nformation that was pertinent to an authorized law enforcement activity when collected does not later lose its pertinence to that activity simply because the information is not of current interest (let alone `necessity') to the agency," id. at 603. The panel majority went on to hold:

> [T]he Privacy Act does not prohibit an agency from maintaining records about an individual's first amendment activities if the information was pertinent to an authorized law enforcement activity when the agency collected the information. The Act does not require an agency to expunge records when they are no longer pertinent to a current law enforcement activity.

Id. at 605. In its conclusion, the D.C. Circuit stated that subsection (e)(7) "does not by its terms" require an agency to show that information is pertinent to a "currently" authorized law enforcement activity, and that it found "nothing in the structure or purpose of the Act that would suggest such a reading." Id. at 607.

Several other courts have upheld the exception's applicability in a variety of contexts. See Doe v. FBI, 936 F.2d 1346, 1354-55, 1360-61 (D.C. Cir. 1991) (although holding that appellant was foreclosed from obtaining relief because he had "not suffered any adverse effect," stating that to extent appellant's argument as to violation of subsection (e)(7) was directed to underlying

FBI records concerning investigation of appellant's "unauthorized possession of an explosive device" and reported advocacy of "violent overthrow of the Government," subsection (e)(7) was not violated as "`law enforcement activity' exception applies"); Wabun-Inini v. Sessions, 900 F.2d 1231, 1245-46 (8th Cir. 1990) (FBI maintenance of photographs seized with probable cause); Jochen v. VA, No. 88-6138, slip op. at 6-7 (9th Cir. Apr. 5, 1989) (VA evaluative report concerning operation of VA facility and job performance of public employee that contained remarks by plaintiff); Nagel v. HEW, 725 F.2d 1438, 1441 & n.3 (D.C. Cir. 1984) (citing Jabara with approval and holding that records describing statements made by employees while at work were properly maintained "for evaluative or disciplinary purposes"); Abernethy, 909 F. Supp. at 1566, 1570 (holding that maintenance of newspaper article that quoted plaintiff on subject of reverse discrimination and "Notice of Potential Class Action Complaint" were "relevant to and pertinent to authorized law enforcement activities" as they appeared in file pertaining to EEO complaint in which plaintiff was complainant's representative and was kept due to belief that a conflict of interest might exist through plaintiff's representation of complainant and, citing Nagel, holding that maintenance was also "valid" in files concerning possible disciplinary action against plaintiff); Maki v. Sessions, No. 1:90-CV-587, slip op. at 20 (W.D. Mich. May 29, 1991) (holding that, although plaintiff claimed FBI investigation was illegal, the uncontested evidence was that plaintiff was the subject of an authorized investigation by FBI); Kassel v. VA, No. 87-217-S, slip op. at 27-28 (D.N.H. Mar. 30, 1992) (citing Nagel and Jabara, inter alia, and holding that information about plaintiff's statements to media fell within ambit of administrative investigation); Pacheco v. FBI, 470 F. Supp. 1091, 1108 n.21 (D.P.R. 1979) ("all investigative files of the FBI fall under the exception"); American Fed'n of Gov't Employees v. Schlesinger, 443 F. Supp. 431, 435 (D.D.C. 1978) (reasonable steps taken by agencies to prevent conflicts of interest are within exception).

It should be noted that a finding that records are maintained in violation of subsection (e)(7) does not mean that those records must be disclosed. See Irons v. Bell, 596 F.2d 468, 470-71 & n.4 (1st Cir. 1979).

H. 5 U.S.C. § 552a(e)(8)

"make reasonable efforts to serve notice on an individual when any record on such individual is made available to any person under compulsory legal process when such process becomes a matter of public record."

comment -- This provision becomes applicable when subsection (b)(11) "court order" disclosures occur. See, e.g., Moore v. United States Postal Serv., 609 F. Supp. 681, 682 (E.D.N.Y. 1985); see also OMB Guidelines, 40 Fed. Reg. 28,948, 28,965 (1975). By its terms, it requires notice not prior to the making of a legally compelled disclosure, but rather at the time that the disclosure becomes a matter of public record. Kassel v. VA, No. 87-217-S, slip op. at 30 (D.N.H. Mar. 30, 1992); see also Moore, 609 F. Supp. at 682 ("§552a(e)(8) does not speak of advance notice of release"); cf. Mangino v. Department of the Army, No. 94-2067, 1994 WL 477260, at **11-12 (D. Kan. Aug. 24, 1994) (citing Moore for proposition that subsection (e)(8) does not require advance notice, although finding no allegation that disclosure at issue was made "under compulsory legal process").

I. 5 U.S.C. § 552a(e)(9)

"establish rules of conduct for persons involved in the design, development, operation, or maintenance of any system of records, or in maintaining any record, and instruct each such person with respect to such rules and the requirements of this section, including any other rules and procedures adopted pursuant to this section and the penalties for noncompliance."

comment -- For a discussion of this provision, see OMB Guidelines, 40 Fed. Reg. 28,948, 28,965 (1975).

J. 5 U.S.C. § 552a(e)(10)

"establish appropriate administrative, technical and physical safeguards to insure the security and confidentiality of records and to protect against any anticipated threats or hazards to their security or integrity which could result in substantial harm, embarrassment, inconvenience, or unfairness to any individual on whom information is maintained."

comment -- This provision may come into play when documents are "leaked." See, e.g., Pilon v. United States Dep't of Justice, 796 F. Supp. 7, 13 (D.D.C. 1992) (because subsection (e)(10) is more specific than subsection (b), it governs with regard to allegedly inadequate safeguards that resulted in disclosure); Kostyu v. United States, 742 F. Supp. 413, 414-17 (E.D. Mich. 1990) (alleged lapses in IRS document-security safeguards were not willful and intentional). For a discussion of this provision, see OMB Guidelines, 40 Fed. Reg. 28,948, 28,966 (1975).

K. 5 U.S.C. § 552a(e)(11)

"at least 30 days prior to publication of information under paragraph (4)(D) of this subsection [routine uses], publish in the Federal Register notice of any new use or intended use of the information in the system, and provide an oppor-

tunity for interested persons to submit written data, views, or arguments to the agency."

comment -- For a discussion of this provision, see OMB Guidelines, 40 Fed. Reg. 28,948, 28,966 (1975).

AGENCY RULES

To implement the Act, an agency that maintains a system of records "shall promulgate rules, in accordance with [notice and comment rulemaking, see 5 U.S.C. § 553]," which shall--

A. 5 U.S.C. § 552a(f)(1)

"establish procedures whereby an individual can be notified in response to his request if any system of records named by the individual contains a record pertaining to him."

comment -- For a discussion of this provision, see OMB Guidelines, 40 Fed. Reg. 28,948, 28,967 (1975).

B. 5 U.S.C. § 552a(f)(2)

"define reasonable times, places, and requirements for identifying an individual who requests his record or information pertaining to him before the agency shall make the record or information available to the individual."

comment -- For a discussion of this provision, see OMB Guidelines, 40 Fed. Reg. 28,948, 28,967 (1975).

C. 5 U.S.C. § 552a(f)(3)

"establish procedures for the disclosure to an individual upon his request of his record or information pertaining to him, including special procedure, if deemed necessary, for the disclosure to an individual of medical records, including psychological records pertaining to him."

comment -- In the past, a typical regulation consistent with this provision would allow an agency to advise an individual requester that his medical records would be provided only to a physician, designated by the individual, who requested the records and established his identity in writing, and that the designated physician would determine which records should be provided to the individual and which should not be disclosed because of the possible harm to the individual or another person.

However, as a result of the opinion by the Court of Appeals for the District of Columbia Circuit in Benavides v. United States Bureau of Prisons, 995 F.2d 269 (D.C. Cir. 1993), such regulations are no longer valid. In Benavides, the D.C. Circuit held that subsection (f)(3) is "strictly procedural . . . merely authoriz[ing] agencies to devise the manner in which they will disclose properly requested non-exempt records" and that "[a] regulation that expressly contemplates that the requesting individual may never see certain medical records [as a result of the discretion

of the designated physician] is simply not a special procedure for disclosure to that person." Id. at 272. The court went on to state that the Justice Department's subsection (f)(3) regulation at issue, 28 C.F.R. § 16.43(d) (1992), "in effect, create[d] another substantive exemption" to Privacy Act access and accordingly held the regulation to be "ultra vires." 995 F.2d at 272-73.

Nevertheless, the D.C. Circuit in Benavides rejected the argument that the Privacy Act requires direct disclosure of medical records to the individual. Recognizing the "potential harm that could result from unfettered access to medical and psychological records," the court provided that "as long as agencies guarantee the ultimate disclosure of the medical records to the requesting individual . . . they should have freedom to craft special procedures to limit the potential harm." Id. at 273; cf. Waldron v. Social Sec. Admin., No. CS-92-334, slip op. at 9-10 (E.D. Wash. July 21, 1993) (holding claim not ripe because plaintiff had not designated representative and had not been denied information (only direct access), but stating that portion of regulation granting representative discretion in providing access to medical records "is troubling because it could be applied in such a manner as to totally deny an individual access to his medical records").

As a result of the Benavides decision, prior case law applying (and thus implicitly upholding) subsection (f)(3) regulations, such as the Justice Department's former regulation, is unreliable. See, e.g., Cowsen-El v. United States Dep't of Justice, 826 F. Supp. 532, 535-37 (D.D.C. 1992) (although recognizing that "the Privacy Act does not authorize government agencies to create new disclosure exemptions by virtue of their regulatory powers under the Privacy Act," nevertheless upholding Department of Justice regulation); Becher v. Demers, No. 91-C-99-S, slip op. at 8 (W.D. Wis. May 28, 1991) (where plaintiff failed to designate medical representative and agency determined that direct access would have adverse effect on plaintiff, request was properly denied); Sweatt v. United States Navy, 2 Gov't Disclosure Serv. (P-H) ¶ 81,038, at 81,102 (D.D.C. Dec. 19, 1980) (withholding of "raw psychological data" in accordance with regulation, on ground that disclosure would adversely affect requester's health, deemed not denial of request), aff'd per curiam, 683 F.2d 420 (D.C. Cir. 1982). But see Hill v. Blevins, No. 3-CV-92-0859, slip op. at 5-7 (M.D. Pa. Apr. 12, 1993) (finding Social Security Administration procedure requiring designation of representative other than family member for receipt and review of medical and psychological information valid), aff'd, 19 F.3d 643 (3d Cir. 1994)

(unpublished table decision); Besecker v. Social Sec., No. 91-C-4818, slip op. at 2-4 (N.D. Ill. Feb. 18, 1992) (dismissal for failure to exhaust administrative remedies where plaintiff failed to designate representative to receive medical records), aff'd, 48 F.3d 1221 (7th Cir. 1995) (unpublished table decision); cf. Polewsky v. Social Sec. Admin., No. 95-6125, 1996 WL 110179, at **1-2 (2d Cir. Mar. 12, 1996) (affirming lower court decision which held that plaintiff's access claims were moot because he had ultimately designated representative to receive medical records and had been provided with them (even though prior to filing suit, plaintiff had refused to designate representative); stating further that plaintiff decided voluntarily to designate representative and thus although issue was "capable of repetition" it had "not been shown to evade review").

Although there is no counterpart provision qualifying a requester's independent right of access to his medical records under the FOIA, the D.C. Circuit found it unnecessary in Benavides to confront this issue. See 995 F.2d at 273. In fact, only two courts have addressed the matter of separate FOIA access and the possible applicability of 5 U.S.C. § 552a(t)(2) (addressing access interplay between Privacy Act and FOIA), one of which was the lower court in a companion case to Benavides. See Smith v. Quinlan, No. 91-1187, slip op. at 7 (D.D.C. Jan. 13, 1992) (court did "not find Section 552a(f)(3) as implemented [by 28 C.F.R. § 16.43(d)] and Section 552a(t)(2) to be incompatible"; reasoning that "if Congress had intended Section 552a(t) to disallow or narrow the scope of special procedures that agencies may deem necessary in releasing medical and psychological records, it would have so indicated by legislation"), rev'd & remanded sub nom. Benavides v. United States Bureau of Prisons, 995 F.2d 269 (D.C. Cir. 1993); Waldron v. Social Sec. Admin., No. CS-92-334, slip op. at 10-15 (E.D. Wash. June 1, 1993) (same as Smith, but with regard to Social Security Administration regulation); cf. Hill, No. 3-CV-92-0859, slip op. at 7 (M.D. Pa. Apr. 12, 1993) (incorrectly interpreting subsection (f)(3) as constituting an "exempting statute" under FOIA).

For further discussion of this provision, see OMB Guidelines, 40 Fed. Reg. 28,948, 28,957, 28,967 (1975), and the Report of the House Committee on Government Operations, H.R. Rep. No. 1416, 93d Cong., 2d Sess., at 16-17 (1974), reprinted in Source Book at 309-10.

D. 5 U.S.C. § 552a(f)(4)

"establish procedures for reviewing a request from an individual concerning the amendment of any record or informa-

tion pertaining to the individual, for making a determination on the request, for an appeal within the agency of an initial adverse agency determination, and for whatever additional means may be necessary for each individual to be able to exercise fully his rights under [the Act]."

comment -- For a discussion of this provision, see OMB Guidelines, 40 Fed. Reg. 28,948, 28,967 (1975).

E. 5 U.S.C. § 552a(f)(5)

"establish fees to be charged, if any, to any individual for making copies of his record, excluding the cost of any search for and review of the record."

comment -- Unlike under the FOIA, search and review costs are never chargeable under the Privacy Act. See OMB Guidelines, 40 Fed. Reg. 28,948, 28,968 (1975).

Note also that subsection (f) provides that the Office of the Federal Register shall biennially compile and publish the rules outlined above and agency notices published under subsection (e)(4) in a form available to the public at low cost.

CIVIL REMEDIES

The Privacy Act provides for four separate and distinct civil causes of action, see 5 U.S.C. § 552a(g), two of which provide for injunctive relief--amendment lawsuits under (g)(1)(A) and access lawsuits under (g)(1)(B)--and two of which provide for compensatory relief in the form of monetary damages--accuracy lawsuits under (g)(1)(C) and lawsuits for other damages under (g)(1)(D).

It is worth noting that several courts have stated that the remedies provided for by the Privacy Act are exclusive, in that a violation of the Act does not provide for any relief in the course of a federal criminal prosecution, see United States v. Bressler, 772 F.2d 287, 293 (7th Cir. 1985) ("[E]ven if the defendant had made a sustainable argument [under 5 U.S.C. § 552a(e)(3)], the proper remedy is a civil action under Section 552a(g)(1) of the Privacy Act, not dismissal of the indictment."); United States v. Bell, 734 F.2d 1315, 1318 (8th Cir. 1984) (Even if appellant's (e)(3) argument was sufficiently raised at trial, "it cannot be a basis for reversing his conviction."); United States v. Gillotti, 822 F. Supp. 984, 989 (W.D.N.Y. 1993) ("[T]he appropriate relief for a violation of Section 552a(e)(7) is found in the statute and allows for damages as well as amendment or expungement of the unlawful records . . . there is nothing in the statute itself, nor in any judicial authority, which suggests that its violation may provide any form of relief in a federal criminal prosecution."), nor is failure to comply with the Privacy Act a proper defense to summons enforcement, see United States v. McAnlis, 721 F.2d 334, 337 (11th Cir. 1983) (compliance with 5 U.S.C. § 552a(e)(3) not prerequisite to enforcement of summons); United States v. Berney, 713 F.2d 568, 572 (10th Cir. 1983) (Privacy Act "contains its own remedies for noncompliance"); see also Estate of Myers v. United States, 842 F. Supp. 1297, 1300-02 (E.D. Wash. 1993) (although dismissing Privacy Act claim on other grounds, nevertheless recognizing applicability of (e)(3) to IRS summons). It has also

been held that "[b]ecause the Privacy Act provides its own remedy for an agency's improper refusal to process a proper request for information, [a plaintiff] is not entitled to mandamus relief." Kotmair v. Netsch, No. 93-490, slip op. at 4 (D. Md. July 21, 1993); cf. Graham v. Hawk, 857 F. Supp. 38, 41 (W.D. Tenn. 1994) ("existence of remedies under the Privacy Act [for alleged inaccuracy] preclude plaintiff's entitlement to mandamus, even though his claim under that act is substantively meritless"), aff'd, 59 F.3d 170 (6th Cir. 1995) (unpublished table decision).

In the context of civil remedies, the only court of appeals to consider the issue has held that the Privacy Act "does not limit the remedial rights of persons to pursue whatever remedies they may have under the [Federal Tort Claims Act]" for privacy violations consisting of record disclosures. O'Donnell v. United States, 891 F.2d 1079, 1084-85 (3d Cir. 1989); cf. Alexander v. FBI, No. 96-2123, 1997 WL 428532, at **7-8 (D.D.C. June 12, 1997) (citing O'Donnell and holding that Privacy Act does not preempt causes of action under local or state law for common law invasion of privacy tort) (interlocutory appeal pending). But see Hager v. United States, No. 86-3555, slip op. at 7-8 (N.D. Ohio Oct. 20, 1987). However, several district courts have held that the Privacy Act's remedies do preclude an action against individual employees for damages under the Constitution in a "Bivens" suit. See, e.g., Sullivan v. United States Postal Serv., 944 F. Supp. 191, 195-96 (W.D.N.Y. 1996); Hughley v. Federal Bureau of Prisons, No. 94-1048, slip op. at 5 (D.D.C. Apr. 30, 1996), aff'd sub nom. Hughley v. Hawks, No. 96-5159, 1997 WL 362725 (D.C. Cir. May 6, 1997); Blazy v. Woolsey, No. 93-2424, 1996 WL 43554, at *1 (D.D.C. Jan. 31, 1996); Williams v. VA, 879 F. Supp. 578, 585-87 (E.D. Va. 1995); Mangino v. Department of the Army, No. 94-2067, 1994 WL 477260, at *9 (D. Kan. Aug. 24, 1994); Mittleman v. United States Treasury, 773 F. Supp. 442, 454 (D.D.C. 1991); see also Patterson v. FBI, 705 F. Supp. 1033, 1045 n.16 (D.N.J. 1989) (to extent First Amendment claim involves damages resulting from maintenance of records, "such an action is apt to be foreclosed by the existence of the Privacy Act"), aff'd, 893 F.2d 595 (3d Cir. 1990). But see Doe v. United States Civil Serv. Comm'n, 483 F. Supp. 539, 564-75 (S.D.N.Y. 1980) (permitting Bivens claim, but relying on fact that plaintiff's claims related in part to events predating effective date of Privacy Act and, more significantly, so holding without benefit of subsequent Supreme Court precedent bearing on issue); see also Alexander, No. 96-2123, 1997 WL 428532, at **7-8 (D.D.C. June 12, 1997) (agreeing with outcome in Blazy and Mittleman, but holding that their logic does not extend to prohibit recovery under local law for torts committed by individuals who, although government employees, were acting outside scope of their employment; holding that "Privacy Act does not preempt the common law invasion of privacy tort").

It also has been held that a court may order equitable relief in the form of the expungement of records either in an action under the Privacy Act or in a direct action under the Constitution. See, e.g., Doe v. United States Air Force, 812 F.2d 738, 741 (D.C. Cir. 1987); Smith v. Nixon, 807 F.2d 197, 204 (D.C. Cir. 1986); Hobson v. Wilson, 737 F.2d 1, 65-66 (D.C. Cir. 1984); Ezenwa v. Gallen, 906 F. Supp. 978, 986 (M.D. Pa. 1995); cf. Dickson v. OPM, 828 F.2d 32, 41 (D.C. Cir. 1987) (suggesting that it is not resolved "whether as a general proposition, the Privacy Act defines the scope of remedies available under the Constitution"). See also discussion of expungement of records under "Amendment Lawsuits," below.

A. Amendment Lawsuits

"Whenever any agency . . . makes a determination under subsection (d)(3) . . . not to amend an individual's record in accordance with his request, or fails to make such review in conformity with that subsection [the individual may bring a civil action against the agency]." 5 U.S.C. § 552a(g)(1)(A).

-- Exhaustion of administrative remedies--through pursuit of an amendment request to the agency and a request for administrative review, see 5 U.S.C. § 552a(d)(2)-(3)--is a prerequisite to a civil action for amendment of records.

comment -- The exhaustion principle is well established in the case law. See, e.g., Quinn v. Stone, 978 F.2d 126, 137-38 (3d Cir. 1992); Hill v. United States Air Force, 795 F.2d 1067, 1069 (D.C. Cir. 1986) (per curiam); Nagel v. HEW, 725 F.2d 1438, 1441 (D.C. Cir. 1984); Olivares v. NASA, 882 F. Supp. 1545, 1552 (D. Md. 1995), aff'd, 103 F.3d 119 (4th Cir. 1996) (unpublished table decision); Jerez v. United States Dep't of Justice, No. 94-100, slip op. at 8-9 (D. Ariz. Feb. 2, 1995); Hass v. United States Air Force, 848 F. Supp. 926, 930 (D. Kan. 1994); Gergick v. Austin, No. 89-0838-CV-W-2, slip op. at 10-11 (W.D. Mo. Apr. 29, 1992), aff'd, No. 92-3210 (8th Cir. July 9, 1993); Simon v. United States Dep't of Justice, 752 F. Supp. 14, 23 & n.6 (D.D.C. 1990), aff'd, 980 F.2d 782 (D.C. Cir. 1992); Campbell v. United States Postal Serv., No. 86-3609, slip op. at 10 (E.D. La. Mar. 28, 1990); Green v. United States Postal Serv., No. 88-0539-CES, slip op. at 6-7 (S.D.N.Y. June 19, 1989); Tracy v. Social Sec. Admin., No. 88-C-570-S, slip op. at 3-4 (W.D. Wis. Sept. 23, 1988); Ertell v. Department of the Army, 626 F. Supp. 903, 909-10 (C.D. Ill. 1986); Freude v. McSteen, No. 4-85-882, slip op. at 4-5 (D. Minn. Oct. 23, 1985), aff'd, 786 F.2d 1171 (8th Cir. 1986) (unpublished table decision); Beaver v. VA, No. 1-82-477, slip op. at 2 (E.D. Tenn. Apr. 6, 1983); Ross v. United States Postal Serv., 556 F. Supp. 729, 735 (N.D. Ala. 1983). One district court has even held that a plaintiff could not "boot-strap" an access claim under (g)(1)(B) into a (g)(1)(A) amendment violation, even though she argued that by denying her request for access the agency had prevented her from exercising her right to request amendment. See Smith v. Continental Assurance Co., No. 91 C 0963, 1991 WL 164348, at *2 (N.D. Ill. Aug. 22, 1991).

Although subsection (d)(2)(A) requires an agency to "acknowledge in writing such receipt" of an amendment request within ten working days, subsection (d)(2)(B) merely requires an agency to "promptly" make the requested correction or inform the individual of its refusal to amend. In construing this language, the Court of Ap-

peals for the District of Columbia Circuit has held that "[t]he statute provides no exemption from administrative review when an agency fails, even by several months, to abide by a deadline, and none is reasonably implied." Dickson v. OPM, 828 F.2d 32, 40 (D.C. Cir. 1987) (requiring exhaustion of subsection (d)(3) administrative appeal remedy even when agency did not respond to initial amendment request for 90 days (citing Nagel, 725 F.2d at 1440-41)).

However, in contrast to subsection (d)(2)(B), subsection (d)(3) requires an agency to make a final determination on administrative appeal from an initial denial of an amendment request within 30 working days (unless, for good cause shown, the head of the agency extends this 30-day period). Thus, court jurisdiction exists as soon as an agency fails to comply with the time requirements of subsection (d)(3); "[t]o require further exhaustion would not only contradict the plain words of the statute but also would undercut [C]ongress's clear intent to provide speedy disposition of these claims." Diederich v. Department of the Army, 878 F.2d 646, 648 (2d Cir. 1989).

In Harper v. Kobelinski, 589 F.2d 721 (D.C. Cir. 1978) (per curiam), and Liguori v. Alexander, 495 F. Supp. 641 (S.D.N.Y. 1980), the agencies denied amendment requests but failed to inform the plaintiffs of their rights to administratively appeal those decisions. In light of the Act's requirement that agencies inform complainants whose amendment requests have been denied of the available administrative remedies, 5 U.S.C. § 552a(d)(2)(B)(ii), the courts in Harper and Liguori refused to penalize the plaintiffs for their failures to exhaust. Harper, 589 F.2d at 723; Liguori, 495 F. Supp. at 646-47; see also Germane v. Heckler, 804 F.2d 366, 369 (7th Cir. 1986) (discussing Harper and Liguori with approval); Mahar v. National Parks Serv., No. 86-0398, slip op. at 7-11 (D.D.C. Dec. 23, 1987) (same).

In White v. United States Civil Serv. Comm'n, 589 F.2d 713, 715-16 (D.C. Cir. 1978) (per curiam), the D.C. Circuit held that, notwithstanding any exhaustion of administrative remedies, an amendment action is "inappropriate and premature" where the individual had not yet sought judicial review (under the APA) of adverse employment decisions, because granting Privacy Act relief "would tend to undermine the established and proven method by which individuals . . . have obtained review from the courts." Cf. Douglas v. Farmers Home Admin., No. 91-1969, slip op. at 2-3 (D.D.C. June 26, 1992) (damages action under Privacy Act dismissed where plaintiff had not sought review

under APA of allegedly inaccurate property appraisal). But see Churchwell v. United States, 545 F.2d 59, 61 (8th Cir. 1976) (probationary employee need not pursue Privacy Act remedy prior to proceeding with due process claim for hearing).

-- Courts "shall determine the matter de novo." 5 U.S.C. § 552(g)(2)(A).

comment -- "De novo review does not contemplate that the court will substitute its judgment for the [agency's], but rather that the court will undertake an independent determination of whether the amendment request should be denied." Nolan v. United States Dep't of Justice, No. 89-A-2035, slip op. at 4-5 (D. Colo. July 17, 1991), appeal dismissed in pertinent part on procedural grounds, 973 F.2d 843 (10th Cir. 1992); see also Doe v. United States, 821 F.2d 694, 697-98 (D.C. Cir. 1987) (holding that "[d]e novo means . . .a fresh, independent determination of `the matter' at stake"). The applicable standards in amendment lawsuits are accuracy, relevancy, timeliness, and completeness. 5 U.S.C. § 552a(d)(2)(B)(i). But see Doe v. United States, 821 F.2d at 697 n.8, 699 (without explanation, stating that "whether the nature of the relief sought is injunctive or monetary, the standard against which the accuracy of the record is measured remains constant" and "[t]hat standard is found in 5 U.S.C. § 552a(e)(5) and reiterated in 5 U.S.C. § 552a(g)(1)(C)"). The burden of proof is on the individual. See Mervin v. FTC, 591 F.2d 821, 827 (D.C. Cir. 1978) (per curiam); Thompson v. Department of Transp. United States Coast Guard, 547 F. Supp. 274, 282 (S.D. Fla. 1982); OMB Guidelines, 40 Fed. Reg. 28,948, 28,969 (1975).

Note that, in a unique statutory displacement action, Congress has expressly removed the jurisdiction of the district courts to order the amendment of IRS records concerning tax liability. 26 U.S.C. § 7852(e) (1994). See, e.g., Gogert v. IRS, No. 86-1674, slip op. at 3 (9th Cir. Apr. 7, 1987); England v. Commissioner, 798 F.2d 350, 351-52 (9th Cir. 1986); Griffith v. Commissioner, No. 96-20134, 1996 WL 340806, at **2-3 (N.D. Cal. June 13, 1996); Chandler v. United States, No. 93-C-812A, slip op. at 3-4 (D. Utah Mar. 8, 1994); Fuselier v. IRS, No. 90-0300, slip op. at 1 (W.D. La. Oct. 25, 1990); Mallas v. Kolak, 721 F. Supp. 748, 751 (M.D.N.C. 1989); Schandl v. Heye, No. 86-6219, slip op. at 2 (S.D. Fla. Sept. 30, 1986); Dyrdra v. Commissioner, No. 85-0-41, slip op. at 2 (D. Neb. Oct. 28, 1985); Conklin v. United States, No. 83-C-587, slip op. at 2-3 (D. Colo. Feb. 26, 1985); Green v. IRS, 556 F. Supp. 79,

80 (N.D. Ill. 1982), aff'd, 734 F.2d 18 (7th Cir. 1984) (unpublished table decision).

Consistent with the OMB Guidelines, 40 Fed. Reg. at 28,958, 28,969, courts have routinely expressed disfavor toward litigants who attempt to invoke the subsection (g)(1)(A) amendment remedy as a basis for collateral attacks on judicial or quasi-judicial determinations recorded in agency records. See, e.g., Douglas v. Agricultural Stabilization & Conservation Serv., 33 F.3d 784, 785 (7th Cir. 1994) ("Privacy Act does not authorize relitigation of the substance of agency decisions"; "the right response . . . is to correct the disposition under the Administrative Procedure Act"); Bailey v. VA, No. 94-55092, slip op. at 3 (9th Cir. Aug. 10, 1994) (plaintiff may not use Privacy Act to collaterally attack grant or denial of benefits); Sugrue v. Derwinski, 26 F.3d 8, 11 (2d Cir. 1994) (Privacy Act may not be used "as a rhetorical cover to attack VA benefits determinations"); Edwards v. Rozzi, No. 92-3008, slip op. at 2 (6th Cir. June 12, 1992) ("[T]he Privacy Act may not be used to challenge unfavorable agency decisions."); Geurin v. Department of the Army, No. 90-16783, slip op. at 2, 4 (9th Cir. Jan. 6, 1992) (doctrine of res judicata bars relitigation of claims under Privacy Act that had been decided against plaintiff by United States Claims Court in prior action under 28 U.S.C. § 1491); Pellerin v. VA, 790 F.2d 1553, 1555 (11th Cir. 1986) (amendment lawsuit challenging VA disability benefits determination dismissed on ground that 38 U.S.C. § 211(a) (later repealed, now see 38 U.S.C. § 511 (1994)) limits judicial review of VA's determinations; noting that Privacy Act "`may not be employed as a skeleton key for reopening consideration of unfavorable federal agency decisions'" (quoting Rogers v. United States Dep't of Labor, 607 F. Supp. 697, 699 (N.D. Cal. 1985))); Gowan v. Department of the Air Force, No. 90-94, slip op. at 26, 33 (D.N.M. Sept. 1, 1995) (Privacy Act "may not be used as a collateral attack on the improper preferral of charges [for court martial], nor may the Privacy Act be used as a method for the Court to oversee the activities of the armed services") (appeal pending); Graham v. Hawk, 857 F. Supp. 38, 40-41 (W.D. Tenn. 1994) ("The Privacy Act is not a means of circumventing [habeas] exhaustion requirement."), aff'd, 59 F.3d 170 (6th Cir. 1995) (unpublished table decision); Williams v. McCausland, 90 Civ. 7563, slip op. at 38-39 (S.D.N.Y. Jan. 18, 1994) (MSPB properly denied plaintiff's request to supplement record of his administrative proceeding before MSPB because request "constitutes an attempt to contest the MSPB's determination on the merits of his request for a stay of his removal"); Smith v. VA, No. CV-93-B-2158-S, slip op. at 4-

5 (N.D. Ala. Jan. 13, 1994) (following Pellerin and holding that plaintiff could not use Privacy Act to challenge dishonorable discharge or denial of VA disability benefits); Smith v. Continental Assurance Co., No. 91 C 0963, 1991 WL 164348, at *5 (N.D. Ill. Aug. 22, 1991) (plaintiff cannot use Privacy Act to collaterally attack agency decision regarding her Federal Employees Health Benefit Act claim); Rowan v. United States Postal Serv., No. 82-C-6550, slip op. at 3-4 (N.D. Ill. May 2, 1984) (Privacy Act not "a means for all governmental employees to have unflattering appraisals removed from their personnel files or shaded according to their own whims or preferences"); Leib v. VA, 546 F. Supp. 758, 762 (D.D.C. 1982) ("The Privacy Act was not intended to be and should not be allowed to become a `backdoor mechanism' to subvert the finality of agency determinations."); Lyon v. United States, 94 F.R.D. 69, 72 (W.D. Okla. 1982) (Privacy Act claim cannot be "a backdoor mechanism to subvert authority bestowed upon the Secretary of Labor to handle employee compensation claims"); Allen v. Henefin, 2 Gov't Disclosure Serv. (P-H) ¶ 81,056, at 81,147 (D.D.C. Dec. 10, 1980) (dismissing lawsuit seeking amendment of supervisor evaluation forms and comments, for failure to exhaust, but noting that "there is considerable doubt as to the permissibility of a Privacy Act suit to collaterally attack a final agency personnel determination of this type"); Weber v. Department of the Air Force, No. C-3-78-146, slip op. at 3-4 (S.D. Ohio Mar. 19, 1979) (Privacy Act not proper means "to arbitrate and determine a dispute over job classification"); Bashaw v. United States Dep't of the Treasury, 468 F. Supp. 1195, 1196-97 (E.D. Wis. 1979) (citing OMB Guidelines with approval and holding that amendment remedy is "neither a necessary nor an appropriate vehicle for resolving the merits of the plaintiff's [discrimination] claims"); Kennedy v. Andrus, 459 F. Supp. 240, 242 (D.D.C. 1978) (noting that OMB Guidelines "clearly forbid collateral attack in the case of final judicial or quasi-judicial actions" and observing that "the same considerations would seem to apply to agency personnel actions, such as the reprimand here, for collateral attack under the Privacy Act could undermine the effectiveness of agency grievance systems"), aff'd, 612 F.2d 586 (D.C. Cir. 1980) (unpublished table decision); cf. Doe v. HHS, 871 F. Supp. 808, 814-15 (E.D. Pa. 1994) ("[T]he specific reporting provisions encompassed in the [Health Care Quality Improvement] Act supersede[] any claims [plaintiff] might have under the Privacy Act."), aff'd, 66 F.3d 310 (3d Cir. 1995) (unpublished table decision).

It has even been held that the Civil Service Reform Act's comprehensive remedial scheme operates to deprive a court of subsection (g)(1)(A) jurisdiction to order the amendment of an allegedly inaccurate job description in a former federal employee's personnel file. See Kleiman v. Department of Energy, 956 F.2d 335, 338 (D.C. Cir. 1992) (refusing to allow exhaustive remedial scheme of CSRA to be "impermissibly frustrated" by granting review of personnel decisions under Privacy Act); see also Wills v. OPM, No. 93-2079, slip op. at 3-4 (4th Cir. Jan. 28, 1994) (alternative holding) (per curiam) (where challenge to merits of statement on SF-50 was actually complaint regarding adverse employment decision, jurisdiction was proper under CSRA); Vessella v. Department of the Air Force, No. 92-2195, slip op. at 4-6 (1st Cir. June 28, 1993) (citing Kleiman and holding that plaintiff could not "bypass the CSRA's regulatory scheme" by bringing Privacy Act claim for same alleged impermissible adverse personnel practices he challenged before MSPB, even though MSPB dismissed his claims as untimely).

Similarly, the D.C. Circuit has held that "[t]he proper means by which to seek a change to military records is through a proceeding before the . . . Board for Correction of Military Records," not under the Privacy Act. Glick v. Department of the Army, No. 91-5213, slip op. at 1 (D.C. Cir. June 5, 1992) (per curiam); see also Cargill v. Marsh, 902 F.2d 1006, 1007-08 (D.C. Cir. 1990) (per curiam) (affirming dismissal of Privacy Act claim; proper means to seek substantive change in military records is through proceeding before Army Board for Correction of Military Records under 10 U.S.C. § 1552(a) (1994)); Doe v. Department of the Navy, 764 F. Supp. 1324, 1327 (N.D. Ind. 1991) ("plaintiff is not free to choose to attempt amendment of his military records under the Privacy Act alone without resort to the records correction board remedy"). But see Diederich v. Department of the Army, 878 F.2d 646, 647-48 (2d Cir. 1989); see also Corrections of Military Records Under the Privacy Act, Defense Privacy Board Advisory Opinion 4 (reissued Apr. 8, 1992) (affording limited review under Privacy Act for factual matters).

It should be noted that several courts have ruled that statutes that provide other avenues of redress, such as the CSRA, can bar certain kinds of subsection (g)(1)(C) damages actions. These cases are discussed below under "Accuracy Lawsuits For Damages."

-- Courts can order an agency to amend records in accordance with a request "or in such other way as the court may direct." 5 U.S.C. § 552a(g)(2)(A).

comment -- The Act contemplates "expungement [of inaccuracies] and not merely redress by supplement." R.R. v. Department of the Army, 482 F. Supp. 770, 774 (D.D.C. 1980); see also Smith v. Nixon, 807 F.2d 197, 204 (D.C. Cir. 1986); Hobson v. Wilson, 737 F.2d 1, 65-66 (D.C. Cir. 1984). In addition, several courts have concluded that judges have the equitable power, even apart from the Privacy Act, to order the expungement of records when the affected individual's privacy interest greatly outweighs the government's interest in maintaining the records. See, e.g., Doe v. United States Air Force, 812 F.2d 738, 740-41 (D.C. Cir. 1987); Fendler v. United States Parole Comm'n, 774 F.2d 975, 979 (9th Cir. 1985); Chastain v. Kelley, 510 F.2d 1232, 1235-38 (D.C. Cir. 1975); Ezenwa v. Gallen, 906 F. Supp. 978, 986 (M.D. Pa. 1995); NTEU v. IRS, 601 F. Supp. 1268, 1273 (D.D.C. 1985); cf. Johnson v. Sessions, No. 92-201, slip op. at 3-4 (D.D.C. Aug. 19, 1992) (refusing to invoke equitable powers to expunge plaintiff's arrest record because court did not have jurisdiction to order FBI to violate its own regulations which require FBI to wait for authorization from appropriate judicial authority before expunging arrest record). But see Scruggs v. United States, 929 F.2d 305, 307 (7th Cir. 1991) (questioning jurisdictional power of courts to order expungement of records that satisfy Privacy Act's requirements).

Once an agency offers to destroy a record in response to an expungement request, the lawsuit is at an end and the agency cannot be compelled to affirmatively determine and announce that the challenged record violated the Act. See Reuber v. United States, 829 F.2d 133, 144-49 (D.C. Cir. 1987); see also Committee in Solidarity v. Sessions, 929 F.2d 742, 745 n.2 (D.C. Cir. 1991); Metadure Corp. v. United States, 490 F. Supp. 1368, 1375 (S.D.N.Y. 1980). But see Doe v. United States Civil Serv. Comm'n, 483 F. Supp. 539, 551 (S.D.N.Y. 1980).

B. Access Lawsuits

"Whenever any agency . . . refuses to comply with an individual request under subsection (d)(1) of this section [the individual may bring a civil action against the agency]." 5 U.S.C. § 552a(g)(1)(B).

-- Courts can enjoin the agency from withholding records and order their production to the individual. See 5 U.S.C. § 552a(g)(3)(A).

comment -- Just as under the FOIA, a requester must comply with agency procedures and exhaust all available administrative remedies--through pursuit of an access request to the agency--prior to bringing a subsection (g)(1)(B) action. See Phillips v. Widnall, No. 96-2099, 1997 WL 176394, at *3 (10th Cir. Apr. 14, 1997); Haase v. Sessions, 893 F.2d 370, 373 (D.C. Cir. 1990); Taylor v. United States Dep't of the Treasury, IRS, No. A-96-CA-333, 1996 U.S. Dist. LEXIS 19909, at *6 (W.D. Tex. Dec. 17, 1996) (appeal pending); Biondo v. Department of the Navy, 928 F. Supp. 626, 630-33 (D.S.C. 1995), aff'd, 86 F.3d 1148 (4th Cir. 1996) (unpublished table decision); Reeves v. United States, No. 94-1291, slip op. at 7-8 (E.D. Cal. Nov. 16, 1994), aff'd, 108 F.3d 338 (9th Cir. 1997) (unpublished table decision); Guzman v. United States, No. S-93-1949, slip op. at 3-5 (E.D. Cal. Oct. 5, 1994); Hass v. United States Air Force, 848 F. Supp. 926, 930 (D. Kan. 1994); Gergick v. Austin, No. 89-0838-CV-W-2, slip op. at 10-11 (W.D. Mo. Apr. 29, 1992), aff'd, No. 92-3210 (8th Cir. July 9, 1993); Wood v. IRS, No. 1:90-CV-2614, slip op. at 7 (N.D. Ga. July 26, 1991); Searcy v. Social Sec. Admin., No. 91-C-26 J, slip op. at 8-11 (D. Utah June 25, 1991) (magistrate's recommendation), adopted (D. Utah Sept. 19, 1991), aff'd, No. 91-4181 (10th Cir. Mar. 2, 1992); Crooker v. Bureau of Prisons, 579 F. Supp. 309, 311 (D.D.C. 1984); Crooker v. United States Marshals Serv., 577 F. Supp. 1217, 1217-18 (D.D.C. 1983); Lilienthal v. Parks, 574 F. Supp. 14, 18 & n.7 (E.D. Ark. 1983); Gibbs v. Rauch, No. 77-59, slip op. at 2-3 (E.D. Ky. Feb. 9, 1978); Larsen v. Hoffman, 444 F. Supp. 245, 256 (D.D.C. 1977).

The Court of Appeals for the Fourth Circuit has also noted that an individual cannot "constructively exhaust" his administrative remedies under the Privacy Act, as "the Privacy Act contains no equivalent to FOIA's `constructive exhaustion' provision[, 5 U.S.C. § 552(a)(6)(C)]." Pollack v. Department of Justice, 49 F.3d 115, 116 n.1 (4th Cir.) (only FOIA claim was properly before district court), cert. denied, 116 S. Ct. 130 (1995); cf. Johnson v. FBI, No. 94-1741, slip op. at 6 (D.D.C. Aug. 31, 1995) (access case citing Pollack and

stating that "Privacy Act contains no `constructive exhaustion' provision as does the FOIA," but determining that "since plaintiff has sought an action in equity, and has not exhausted his administrative remedies through administrative appeal . . . plaintiff is barred from seeking injunctive relief under the Privacy Act"). However, an agency's failure to comply with its own regulations can undercut an exhaustion defense. See Jonsson v. IRS, No. 90-2519, slip op. at 2-3 (D.D.C. May 4, 1992); Haldane v. Commissioner, No. 90-654M, slip op. at 4-6 (W.D. Wash. Aug. 23, 1990).

Several courts have recognized that jurisdiction to consider a Privacy Act access claim exists only if the government has failed to comply with a request for records; once a request is complied with and the responsive records have been disclosed, a Privacy Act access claim is moot. See Biondo, 928 F. Supp. at 631; Letscher v. IRS, No. 95-0077, slip op. at 3 (D.D.C. July 6, 1995); Polewsky v. Social Sec. Admin., No. 5:93-CV-200, slip op. at 9-10 (D. Vt. Mar. 31, 1995) (magistrate's recommendation), adopted (D. Vt. Apr. 13, 1995), aff'd, No. 95-6125, 1996 WL 110179, at *2 (2d Cir. Mar. 12, 1996); Smith v. Continental Assurance Co., No. 91 C 0963, 1991 WL 164348, at *3 (N.D. Ill. Aug. 22, 1991).

The Court of Appeals for the Seventh Circuit has ruled that 26 U.S.C. § 6103 (1994 & Supp. I 1995) "displaces" the Privacy Act and shields tax return information from release even to a first-party requester. Cheek v. IRS, 703 F.2d 271, 272 (7th Cir. 1983) (per curiam); see also Paige v. IRS, No. 1P-85-64-C, slip op. at 3-4 (S.D. Ind. Jan. 13, 1986). The Court of Appeals for the Ninth Circuit has confusingly interpreted 26 U.S.C. § 7852(e) (1994) to likewise prevent Privacy Act access to records pertaining to tax liability. Jacques v. IRS, No. 91-15992, slip op. at 6 (9th Cir. Aug. 5, 1992); O'Connor v. United States, No. 89-15321, slip op. at 5 (9th Cir. June 4, 1991). The Ninth Circuit's interpretation of 26 U.S.C. § 7852(e), however, seems to go beyond that statute's objective of exempting determinations of tax liability from the Privacy Act's amendment provisions. Cf. Wood v. IRS, No. 1:90-CV-2614, slip op. at 1-2, 7 (N.D. Ga. July 29, 1991) (denying plaintiff summary judgment on other grounds, but not barring Privacy Act request for access to records concerning plaintiff's tax liability).

Damages are not recoverable in an access case. See Benoist v. United States, No. 87-1028, slip op. at 3 (8th Cir. Nov. 4, 1987); Thurston v. United States, 810 F.2d 438, 447 (4th Cir. 1987); Vennes v. IRS, No. 5-88-36, slip op. at

6-7 (D. Minn. Oct. 14, 1988) (magistrate's recommendation), adopted (D. Minn. Feb. 14, 1989), aff'd, No. 89-5136MN (8th Cir. Oct. 13, 1989); Bentson v. Commissioner, No. 83-048-GLO-WDB, slip op. at 2 (D. Ariz. Sept. 14, 1984); see also Quinn v. HHS, 838 F. Supp. 70, 76 (W.D.N.Y. 1993) (citing Thurston in dictum).

-- Courts "shall determine the matter de novo." 5 U.S.C. § 552a(g)(3)(A).

-- Courts may review records in camera to determine whether any of the exemptions set forth in subsection (k) apply. See 5 U.S.C. § 552a(g)(3)(A).

C. Accuracy Lawsuits for Damages

"Whenever any agency . . . fails to maintain any record concerning any individual with such accuracy, relevance, timeliness, and completeness as is necessary to assure fairness in any determination relating to the qualifications, character, rights, or opportunities of, or benefits to the individual that may be made on the basis of such record, and consequently a determination is made which is adverse to the individual [the individual may bring a civil action against the agency]." 5 U.S.C. § 552a(g)(1)(C).

comment -- The standard of accuracy under this provision is the same as under subsection (e)(5), which requires agencies to maintain records used in making determinations about individuals "with such accuracy, relevance, timeliness, and completeness as is reasonably necessary to assure fairness to the individual in the determination."

As mentioned earlier, failure to comply with subsection (e)(5) gives rise to an amendment lawsuit under subsection (g)(1)(A), provided that administrative remedies (under subsections (d)(2)-(3)) have been exhausted. Note, however, that such exhaustion is not required prior to bringing a damages lawsuit under subsection (g)(1)(C) (or, for that matter, under subsection (g)(1)(D)). See Phillips v. Widnall, No. 96-2099, 1997 WL 176394, at **2-3 (10th Cir. Apr. 14, 1997); Diederich v. Department of the Army, 878 F.2d 646, 648 (2d Cir. 1989); Hubbard v. United States Envtl. Protection Agency, Adm'r, 809 F.2d 1, 7 (D.C. Cir.), vacated in nonpertinent part & reh'g en banc granted (due to conflict in circuit), 809 F.2d 1 (D.C. Cir. 1986), resolved on reh'g en banc sub nom. Spagnola v. Mathis, 859 F.2d 223 (D.C. Cir. 1988); Nagel v. HEW, 725 F.2d 1438, 1441 & n.2 (D.C. Cir. 1984); Gergick v. Austin, No. 89-0838-CV-W-2, slip op. at 11 (W.D. Mo. Apr. 29, 1992), aff'd, No. 92-3210 (8th Cir. July 9, 1993); Doe v. FBI, No. 91-1252, slip op. at 8 (D.N.J. Feb. 26, 1992); Pope v. Bond, 641 F. Supp. 489, 500 (D.D.C. 1986). But see Olivares v. NASA, 882 F. Supp. 1545, 1546, 1552 (D. Md. 1995) (apparently confusingly concluding that failure to exhaust administrative remedies precludes damages claim under subsection

(e)(5)), aff'd, 103 F.3d 119 (4th Cir. 1996) (unpublished table decision); Graham v. Hawk, 857 F. Supp. 38, 40 (W.D. Tenn. 1994) (heedlessly stating that "[e]ach paragraph of 5 U.S.C. § 552a(g) . . . requires as a prerequisite to any action that the agency refuse an individual's request to take some corrective action regarding his file"), aff'd, 59 F.3d 170 (6th Cir. 1995) (unpublished table decision).

In addition, de novo review is not provided for in (g)(1)(C) (or, for that matter, (g)(1)(D)) actions, see 5 U.S.C. § 552a(g)(4); rather, the court is to determine whether the standards articulated in subsection (g)(1)(C) have been met. See Sellers v. Bureau of Prisons, 959 F.2d 307, 312-13 (D.C. Cir. 1992); White v. OPM, 787 F.2d 660, 663 (D.C. Cir. 1986); Nolan v. United States Dep't of Justice, No. 89-A-2035, slip op. at 4 (D. Colo. July 17, 1991), appeal dismissed in pertinent part on procedural grounds, 973 F.2d 843 (10th Cir. 1992); see also Doe v. United States, 821 F.2d 694, 712 (D.C. Cir. 1987) (en banc) (Mikva, J., joined by Robinson and Edwards, JJ., dissenting.)

However, in order to bring a damages action under subsection (g)(1)(C), an individual has the burden of proving that (1) a defective record (2) proximately caused (3) an adverse determination concerning him. See, e.g., Deters v. United States Parole Comm'n, 85 F.3d 655, 657 (D.C. Cir. 1996); Rose v. United States, 905 F.2d 1257, 1259 (9th Cir. 1990); Johnston v. Horne, 875 F.2d 1415, 1422 (9th Cir. 1989); White v. OPM, 840 F.2d 85, 87 (D.C. Cir. 1988); Hubbard, 809 F.2d at 4-6; Hewitt v. Grabicki, 794 F.2d 1373, 1379 (9th Cir. 1986); Perry v. FBI, 759 F.2d 1271, 1275, rev'd en banc on other grounds, 781 F.2d 1294 (7th Cir. 1986); Molerio v. FBI, 749 F.2d 815, 826 (D.C. Cir. 1984); Clarkson v. IRS, 678 F.2d 1368, 1377 (11th Cir. 1982) (citing Edison v. Department of the Army, 672 F.2d 840, 845 (11th Cir. 1982)); Kellett v. United States, 856 F. Supp. 65, 70-71 (D.N.H. 1994), aff'd, 66 F.3d 306 (1st Cir. 1995) (unpublished table decision); McGregor v. Greer, 748 F. Supp. 881, 886 (D.D.C. 1990); Mobley v. Doyle, No. JH-87-3300, slip op. at 3-5 (D. Md. Nov. 8, 1988); Wirth v. Social Sec. Admin., No. JH-85-1060, slip op. at 6 (D. Md. Jan. 20, 1988); NTEU v. IRS, 601 F. Supp. 1268, 1271-72 (D.D.C. 1985); see also Williams v. Bureau of Prisons, No. 94-5098, 1994 WL 676801, at *1 (D.C. Cir. Oct. 21, 1994) (appellant did not establish either that agency "maintained an inaccurate record or that it made a determination adverse to him in reliance on inaccurate information capable of verification, the statutory prerequisites to maintaining an action pursuant to the Privacy Act"); Hadley v. Moon, No. 94-1212, 1994 WL 582907, at **1-2 (10th Cir. Oct. 21, 1994) (plaintiff must allege actual detriment or adverse determination in order to maintain claim under Privacy Act); Hughley v. Federal Bu-

reau of Prisons, No. 94-1048, slip op. at 4-5 (D.D.C. Apr. 30, 1996) (admitted inaccuracy in plaintiff's presentence investigation report regarding length of prior sentence did not result in "any cognizable injury that would give rise to an action under Section (g)(1)(C) because no adverse determination was made based on the inaccurate statement"; report correctly calculated plaintiff's criminal history points regardless of error), aff'd sub nom. Hughley v. Hawk, No. 96-5159, 1997 WL 362725 (D.C. Cir. May 6, 1997); Schwartz v. United States Dep't of Justice, No. 94 CIV. 7476, 1995 WL 675462, at **7-8 (S.D.N.Y. Nov. 14, 1995) (alleged inaccuracy in presentence report "cannot have caused an adverse determination" where sentencing judge was made aware of error and stated that fact at issue was not material for sentencing, nor did any omission of additional facts in report result in plaintiff's "not receiving a fair determination relating to his rights"), aff'd, 101 F.3d 686 (2d Cir. 1996) (unpublished table decision); Gowan v. Department of the Air Force, No. 90-94, slip op. at 34 (D.N.M. Sept. 1, 1995) (inaccuracy in report, i.e., listing of witnesses who were not interviewed, did not cause adverse agency action) (appeal pending).

In addition, an agency must be found to have acted in an "intentional or willful" manner in order for a damages action to succeed. See 5 U.S.C. § 552a(g)(4). This standard is discussed below under "Intentional/Willful Standard and Actual Damages in Accuracy and Other Damages Lawsuits."

Just as in the amendment context (see discussion above), many courts have expressed disfavor toward litigants who attempt to invoke the subsection (g)(1)(C) damages remedy as a basis for collateral attacks on judicial and quasi-judicial agency determinations, such as benefit and employment decisions. See, e.g., Douglas v. Farmers Home Admin., No. 91-1969, slip op. at 2-3 (D.D.C. June 26, 1992) (applying principles of White v. United States Civil Serv. Comm'n, 589 F.2d 713 (D.C. Cir. 1978) (per curiam) (amendment lawsuit), and holding that plaintiff not entitled to bring Privacy Act damages action for allegedly inaccurate appraisal of his property where he had not sought judicial review under APA); Thomas v. United States Parole Comm'n, No. 94-0174, slip op. at 11-12 (D.D.C. Sept. 7, 1994) (plaintiff should not be allowed to use Privacy Act "to collaterally attack the contents of his presentence report," as he "originally had the opportunity to challenge the accuracy . . . before the judge who sentenced him"); Castella v. Long, 701 F. Supp. 578, 584-85 (N.D. Tex.) ("collateral attack on correctness of the finding supporting the discharge decision" improper under Act), aff'd, 862 F.2d 872 (5th Cir. 1988) (unpublished table decision); Holmberg v. United States, No. 85-2052, slip op. at 2-3 (D.D.C. Dec. 10, 1985) (Privacy Act "cannot be

used to attack the outcome of adjudicatory-type proceedings by alleging that the underlying record was erroneous"); see also Hurley v. Bureau of Prisons, No. 95-1696, 1995 U.S. App. LEXIS 30148, at *4 (1st Cir. Oct. 24, 1995) (any alleged inaccuracy in plaintiff's presentence report, which agency relied on, "should have been brought to the attention of the district court at sentencing; or, at the very least, on appeal from his conviction and sentence"). The OMB Guidelines, 40 Fed. Reg. 28,948, 28,969 (1975), also address this issue.

As in the amendment context, 26 U.S.C. § 7852(e) (1994) (Internal Revenue Code) also displaces the Privacy Act's damages remedies for matters concerning tax liability. See, e.g., Ford v. United States, IRS, No. 91-36319, slip op. at 4-5 (9th Cir. Dec. 24, 1992); McMillen v. United States Dep't of Treasury, 960 F.2d 187, 188 (1st Cir. 1991); Sherwood v. United States, No. 96-2223, 1996 WL 732512, at *9 (N.D. Cal. Dec. 9, 1996); Trimble v. United States, No. 92-74219, slip op. at 1-2 (E.D. Mich. May 18, 1993), aff'd, 28 F.3d 1214 (6th Cir. 1994) (unpublished table decision); cf. Government Nat'l Mortgage, Ass'n v. Lunsford, No. 95-273, 1996 U.S. Dist. LEXIS 1591, at *8 (E.D. Ky. Feb. 2, 1996) (dismissing Privacy Act claim for wrongful disclosure (presumably brought under (g)(1)(D)) and stating that "26 U.S.C. § 7852(e) precludes the maintenance of Privacy Act damages remedies in matters concerning federal tax liabilities"); Estate of Myers v. United States, 842 F. Supp. 1297, 1302-04 (E.D. Wash. 1993) (dismissing Privacy Act (g)(1)(D) damages claim and applying § 7852(e)'s jurisdictional bar to preclude Privacy Act applicability to determination of foreign tax liability).

In Hubbard v. United States Envtl. Protection Agency, Adm'r, the leading D.C. Circuit case concerning the causation requirement of subsection (g)(1)(C), the D.C. Circuit's finding of a lack of causation was heavily influenced by the Civil Service Reform Act's jurisdictional bar to district court review of government personnel practices. See 809 F.2d at 5. Although the D.C. Circuit stopped short of holding that the CSRA's comprehensive remedial scheme constitutes a jurisdictional bar to a subsection (g)(1)(C) action, it noted that "it would be anomalous to construe the pre-existing Privacy Act to grant the district court power to do indirectly that which Congress precluded directly: `the Privacy Act was not intended to shield [federal] employees from the vicissitudes of federal personnel management decisions.'" Id. (quoting Albright v. United States, 732 F.2d 181, 190 (D.C. Cir. 1984)); cf. Biondo v. Department of the Navy, No. 2:92-0184-18, slip op. at 21-23 (D.S.C. June 29, 1993) (finding, based on Hubbard, "that the `collateral attack' argument complements the causation requirement of the Privacy Act"). The concurring opinion in Hubbard

objected to this "canon of niggardliness" in construing subsection (g)(1)(C) and noted that circuit precedents since the passage of the CSRA have "without a hint of the majority's caution, reviewed the Privacy Act claims of federal employees or applicants embroiled in personnel disputes." 809 F.2d at 12-13 (Wald, J., concurring) (citing Molerio, 749 F.2d at 826, Albright, 732 F.2d at 188, and Borrell v. United States Int'l Communications Agency, 682 F.2d 981, 992-93 (D.C. Cir. 1982)).

Although Hubbard merely applied a strict causation test where a government personnel determination was being challenged, several more recent cases have extended Hubbard's reasoning and have construed the CSRA's comprehensive remedial scheme to constitute a jurisdictional bar to subsection (g)(1)(C) damages lawsuits challenging federal employment determinations. See Houlihan v. OPM, 909 F.2d 383, 384-85 (9th Cir. 1990) (per curiam); Henderson v. Social Sec. Admin., 908 F.2d 559, 560-61 (10th Cir. 1990), aff'g 716 F. Supp. 15, 16-17 (D. Kan. 1989)); Miller v. Hart, No. PB-C-91-249, slip op. at 6-8 (E.D. Ark. Feb. 25, 1993); Kassel v. VA, No. 87-217-S, slip op. at 7-8 (D.N.H. Mar. 30, 1992); Holly v. HHS, No. 89-0137, slip op. at 1 (D.D.C. Aug. 9, 1991), aff'd, 968 F.2d 92 (D.C. Cir. 1992) (unpublished table decision); Barhorst v. Marsh, 765 F. Supp. 995, 999 (E.D. Mo. 1991); Barkley v. United States Postal Serv., 745 F. Supp. 892, 893-94 (W.D.N.Y. 1990); McDowell v. Cheney, 718 F. Supp. 1531, 1543 (M.D. Ga. 1989); Holly v. HHS, No. 87-3205, slip op. at 4-6 (D.D.C. Aug. 22, 1988), aff'd, 895 F.2d 809 (D.C. Cir. 1990) (unpublished table decision); Tuesburg v. HUD, 652 F. Supp. 1044, 1049 (E.D. Mo. 1987); see also Phillips v. Widnall, No. 96-2099, 1997 WL 176394, at *3 (10th Cir. Apr. 14, 1997) (citing Henderson to hold that claim concerning alleged inaccuracies and omissions in appellant's employment file that formed basis of her claim for damages to remedy loss of promotion and other benefits of employment "is not a recognizable claim under the Privacy Act," as "CSRA provides the exclusive remedial scheme for review of [appellant's] claims related to her position as a nonappropriated fund instrumentality employee"); Vessella v. Department of the Air Force, No. 92-2195, slip op. at 5-6 (1st Cir. June 28, 1993) (citing Hubbard and Henderson for proposition that Privacy Act "cannot be used . . . to frustrate the exclusive, comprehensive scheme provided by the CSRA"); Pippinger v. Secretary of the United States Treasury, No. 95-CV-017, 1996 U.S. Dist. LEXIS 5485, at *15 (D. Wyo. Apr. 10, 1996) (citing Henderson and stating that to extent plaintiff challenges accuracy of his personnel records, action cannot be maintained because court does not have jurisdiction "to review errors in judgment that occur during the course of an employment/personnel decision where the CSRA

precludes such review") (appeal pending); Edwards v. Baker, No. 83-2642, slip op. at 4-6 (D.D.C. July 16, 1986) (Privacy Act challenge to "employee performance appraisal system" rejected on ground that "plaintiffs may not use that Act as an alternative route for obtaining judicial review of alleged violations of the CSRA"). Other cases have declined to go that far. See Doe v. FBI, 718 F. Supp. 90, 94-95 n.14 (D.D.C. 1989) (rejecting contention that CSRA limits subsection (g)(1)(C) actions); see also Halus v. United States Dep't of the Army, No. 90-654M, slip op. at 11 n.8 (E.D. Pa. Aug. 15, 1990) ("court may determine whether a Privacy Act violation caused the plaintiff damage (here, the loss of his job)"); Hay v. Secretary of the Army, 739 F. Supp. 609, 612-13 (S.D. Ga. 1990) (similar).

As yet, the D.C. Circuit has declined to rule that the CSRA bars a Privacy Act claim for damages. See Kleiman v. Department of Energy, 956 F.2d 335, 337-39 & n.5 (D.C. Cir. 1992) (holding that Privacy Act does not afford relief where plaintiff did not contest that record accurately reflected his assigned job title, but rather challenged his position classification--a personnel decision judicially unreviewable under the CSRA--but noting that nothing in opinion "should be taken to cast doubt on Hubbard's statement that `the Privacy Act permits a federal job applicant to recover damages for an adverse personnel action actually caused by an inaccurate or incomplete record'" (quoting Hubbard, 809 F.2d at 5)); Holly v. HHS, No. 88-5372, slip op. at 1 (D.C. Cir. Feb. 7, 1990) (declining to decide whether CSRA in all events precludes Privacy Act claim challenging federal employment determination; instead applying doctrine of "issue preclusion" to bar individual "from relitigating an agency's maintenance of challenged records where an arbitrator--in a negotiated grievance proceeding that included review of such records--had previously found that no "[agency] manager acted arbitrarily, capriciously or unreasonably in determining [that plaintiff] was not qualified"). But see Holly v. HHS, No. 89-0137, slip op. at 1 (D.D.C. Aug. 9, 1991) (citing Kleiman for proposition that court lacks subject matter jurisdiction in Privacy Act damages action where challenging a personnel action governed by the CSRA), aff'd, 968 F.2d 92 (D.C. Cir. 1992) (unpublished table decision).

In Rosen v. Walters, 719 F.2d 1422, 1424-25 (9th Cir. 1983), the Court of Appeals for the Ninth Circuit held that 38 U.S.C. § 211(a) (later repealed, now see 38 U.S.C. § 511 (1994))--a statute that broadly precludes judicial review of VA disability benefit decisions--operated to bar a subsection (g)(1)(C) damages action. In Rosen, the plaintiff contended that the VA deliberately destroyed medical records pertinent to his disability claim, thereby preventing him from presenting

all the evidence in his favor. Id. at 1424. The Ninth Circuit ruled that such a damages claim would "necessarily run counter to the purposes of § 211(a)" because it would require a determination as to whether "but for the missing records, Rosen should have been awarded disability benefits." Id. at 1425. Further, it declined to find that the Privacy Act "repealed by implication" 38 U.S.C. § 211(a). Id.; see also R.R. v. Department of the Army, 482 F. Supp. 770, 775-76 (D.D.C. 1980) (rejecting damages claim for lack of causation and noting that "[w]hat plaintiff apparently seeks to accomplish is to circumvent the statutory provisions making the VA's determinations of benefits final and not subject to judicial review"); cf. Kaswan v. VA, No. 81-3805, slip op. at 31 (E.D.N.Y. Sept. 15, 1988) (Privacy Act "not available to collaterally attack factual and legal decisions to grant or deny veterans benefits"), aff'd, 875 F.2d 856 (2d Cir. 1989) (unpublished table decision); Leib v. VA, 546 F. Supp. 758, 761-62 (D.D.C. 1982) ("The Privacy Act was not intended to be and should not be allowed to become a `backdoor mechanism' to subvert the finality of agency determinations." (quoting Lyon v. United States, 94 F.R.D. 69, 72 (W.D. Okla. 1982))).

Two district courts in California have also declined to review Privacy Act claims concerning Federal Aviation Administration orders because the Federal Aviation Act, 49 U.S.C. § 46110 (1994), "preempts district courts from exercising subject matter jurisdiction over claims against the FAA involving final FAA orders" and places "exclusive jurisdiction" in the courts of appeals. Crist v. Leippe, No. CIV.S-95-2100, 1996 WL 173124, at **2-3 (E.D. Cal. Apr. 3, 1996) (appeal pending); Ruggiero v. FAA, No. C-95-20008, 1995 WL 566022, at *1 (N.D. Cal. Sept. 21, 1995).

In Perry v. FBI, 759 F.2d at 1275, the Court of Appeals for the Seventh Circuit, without discussing subsection (g)(1)(C), adopted a comparatively narrower construction of subsection (e)(5), holding that "when one federal agency sends records to another agency to be used by the latter in making a decision about someone, the responsibility for ensuring that the information is accurate, relevant, timely, and complete lies with the receiving agency--the agency making `the determination' about the person in question--not the sending agency."

Subsequently, though, in Dickson v. OPM, 828 F.2d 32, 36-40 (D.C. Cir. 1987), the D.C. Circuit held that a subsection (g)(1)(C) damages lawsuit is proper against any agency maintaining a record violating the standard of fairness mandated by the Act, regardless of whether that agency is the one making the adverse determination. See also Doe v. United States Civil Serv. Comm'n, 483 F. Supp. 539, 556 (S.D.N.Y. 1980) (applying subsection

(e)(5) to agency whose records were used by another agency in making determination about individual); R.R. v. Department of the Army, 482 F. Supp. at 773 (same). In so holding, the D.C. Circuit noted that "the structure of the Act makes it abundantly clear that [sub]section (g) civil remedy actions operate independently of the obligations imposed on agency recordkeeping pursuant to [sub]section (e)(5)." Dickson, 828 F.2d at 38. In Dickson, the D.C. Circuit distinguished Perry on the grounds that "[a]ppellant is not proceeding under [sub]section (e)(5), Perry does not discuss [sub]section (g)(1)(C), and the construction of (e)(5) does not migrate by logic or statutory mandate to a separate [sub]section on civil remedies." 828 F.2d at 38. See also Doe v. FBI, 718 F. Supp. at 95 n.15 (noting conflict in cases).

Assuming that causation is proven, "actual damages" sustained by the individual as a result of the failure--or $1,000, whichever is greater--are recoverable. See 5 U.S.C. § 552a(g)(4)(A). The meaning of "actual damages" and the $1,000 minimum recovery provision are discussed below under "Intentional/Willful Standard and Actual Damages in Accuracy and Other Damages Lawsuits."

D. Other Damages Lawsuits

"Whenever any agency . . . fails to comply with any other provision of this section, or any rule promulgated thereunder, in such a way as to have an adverse effect on an individual [the individual may bring a civil action]." 5 U.S.C. § 552a(g)(1)(D).

comment -- A complaint is subject to dismissal, for failure to state a subsection (g)(1)(D) damages claim, if no "adverse effect" is alleged. See, e.g., Quinn v. Stone, 978 F.2d 126, 135 (3d Cir. 1992) ("[T]he adverse effect requirement of (g)(1)(D) is, in effect, a standing requirement."); Hass v. United States Air Force, 848 F. Supp. 926, 932 (D. Kan. 1994); Swenson v. United States Postal Serv., No. S-87-1282, slip op. at 19-20 (E.D. Cal. Mar. 10, 1994); Green v. United States Postal Serv., No. 88-0539, slip op. at 7 (S.D.N.Y. June 19, 1989); Tracy v. Social Sec. Admin., No. 88-C-570-S, slip op. at 4-5 (W.D. Wis. Sept. 23, 1988); Bryant v. Department of the Air Force, No. 85-4096, slip op. at 5 (D.D.C. Mar. 31, 1986); Harper v. United States, 423 F. Supp. 192, 196-97 (D.S.C. 1976); see also Crichton v. Community Servs. Admin., 567 F. Supp. 322, 324 (S.D.N.Y. 1983) (mere maintenance of allegedly "secret file" insufficient to warrant damages where no showing of adverse effect); Church v. United States, 2 Gov't Disclosure Serv. (P-H) ¶ 81,350, at 81,911 (D. Md. Jan. 5, 1981) (no adverse effect from failure to provide subsection (e)(3) notice).

An "adverse effect" includes not only monetary damages, but also nonpecuniary and nonphysical

harm, such as mental distress, embarrassment, or emotional trauma. See Quinn, 978 F.2d at 135-36; Albright v. United States, 732 F.2d 181, 186 (D.C. Cir. 1984); Usher v. Secretary of HHS, 721 F.2d 854, 856 (1st Cir. 1983); Parks v. IRS, 618 F.2d 677, 682-83 & n.2 (10th Cir. 1980); Romero-Vargas v. Shalala, 907 F. Supp. 1128, 1134 (N.D. Ohio 1995); see also Englerius v. VA, 837 F.2d 895, 897 (9th Cir. 1988).

For a novel interpretation of "adverse effect," see Bagwell v. Brannon, No. 82-8711, slip op. at 5-6 (11th Cir. Feb. 22, 1984), in which the Court of Appeals for the Eleventh Circuit found that no "adverse effect" was caused by the government's disclosure of an employee's personnel file (during cross-examination) while defending against the employee's tort lawsuit, because the "employee created the risk that pertinent but embarrassing aspects of his work record would be publicized" and "disclosure was consistent with the purpose for which the information was originally collected."

The threshold showing of "adverse effect," which typically is not difficult for a plaintiff to satisfy, should carefully be distinguished from the conceptually separate requirement of "actual damages," discussed below.

A showing of causation--that the violation caused an adverse effect, and that the violation caused "actual damages," as discussed below--is also required. See, e.g., Quinn, 978 F.2d at 135; Hewitt v. Grabicki, 794 F.2d 1373, 1379 (9th Cir. 1986); Albright, 732 F.2d at 186-87; Edison v. Department of the Army, 672 F.2d 840, 842, 845 (11th Cir. 1982); Swenson, No. S-87-1282, slip op. at 19-21 (E.D. Cal. Mar. 10, 1994); Connelly v. Comptroller of the Currency, No. H-84-3783, slip op. at 4 (S.D. Tex. June 3, 1991); Rodgers v. Department of the Army, 676 F. Supp. 858, 862 (N.D. Ill. 1988); Tuesburg v. HUD, 652 F. Supp. 1044, 1048 (E.D. Mo. 1987); Ely v. Department of Justice, 610 F. Supp. 942, 946 (N.D. Ill. 1985), aff'd, 792 F.2d 142 (7th Cir. 1986) (unpublished table decision). But see Rickles v. Marsh, No. 3:88-100, slip op. at 8-9 (N.D. Ga. Jan. 10, 1990) (aberrational decision awarding minimum damages even in absence of causation).

In addition, an agency must be found to have acted in an "intentional or willful" manner in order for a damages action to succeed. See 5 U.S.C. § 552a(g)(4). This standard is discussed below under "Intentional/Willful Standard and Actual Damages in Accuracy and Other Damages Lawsuits."

E. Intentional/Willful Standard and Actual Damages in Accuracy and Other Damages Lawsuits

"In any suit brought under the provisions of subsection (g)(1)(C) or (D) of this section in which the court deter-

mines that the agency acted in a manner which was intentional or willful, the United States shall be liable to the individual in an amount equal to the sum of . . . actual damages sustained by the individual as a result of the refusal or failure, but in no case shall a person entitled to recovery receive less than the sum of $1,000." 5 U.S.C. § 552a(g)(4).

comment -- In order for there to be any liability in a (g)(1)(C) or (D) damages lawsuit, the agency must have acted in an "intentional or willful" manner. 5 U.S.C. § 552a(g)(4). It is important to understand that the words "intentional" and "willful" in subsection (g)(4) do not have their vernacular meanings; instead, they are "terms of art." White v. OPM, 840 F.2d 85, 87 (D.C. Cir. 1988) (per curiam). The Act's legislative history indicates that this unique standard is "[o]n a continuum between negligence and the very high standard of willful, arbitrary, or capricious conduct," and that it "is viewed as only somewhat greater than gross negligence." 120 Cong. Rec. 40,406 (1974), reprinted in Source Book at 862.

While not requiring premeditated malice, see Parks v. IRS, 618 F.2d 677, 683 (10th Cir. 1980), the voluminous case law construing this standard makes clear that it is a formidable barrier for a plaintiff seeking damages. See, e.g., Deters v. United States Parole Comm'n, 85 F.3d 655, 660 (D.C. Cir. 1996) (Parole Commission did not "`flagrantly disregard'" plaintiff's privacy when it supplemented his file with rebuttal quantity of drugs attributed to him in presentence investigation report (PSI) and offered inmate hearing concerning accuracy of disputed report and "[e]ven if the Commission inadvertently or negligently violated [plaintiff's] Privacy Act rights by not examining the accuracy of the PSI before preparing a preliminary assessment . . . such a violation (if any) could in no sense be deemed `patently egregious and unlawful'" (quoting Albright and Laningham, infra)); Bailey v. Clay, No. 95-7533, 1996 WL 155160, at *1 (4th Cir. Mar. 29, 1996) (stating that because appellant had alleged mere negligence, he had not stated claim under Privacy Act); Nathanson v. FDIC, No. 95-1604, 1996 U.S. App. LEXIS 3111, at **3-6 (1st Cir. Feb. 22, 1996) (per curiam) (although declining to affirm district court opinion on basis that disclosure pursuant to routine use was proper given that published agency commentary conflicted with such routine use, nevertheless affirming on grounds that disclosure was not intentional and willful because routine use "afforded reasonable grounds for belie[f] that [agency employee's] conduct was lawful"); Kellett v. United States Bureau of Prisons, No. 94-1898, 1995 U.S. App. LEXIS 26746, at **8-10 (1st Cir. Sept. 18, 1995) (per curiam) (standard requires "showing that the agency acted without grounds for believing its action to be lawful, or in `flagrant disregard' for rights under the Act" (quoting Wilborn v. HHS, infra)); Rose v. United States, 905 F.2d

1257, 1260 (9th Cir. 1990) ("conduct amounting to more than gross negligence" is required); Johnston v. Horne, 875 F.2d 1415, 1422-23 (9th Cir. 1989) (same); Scullion v. VA, No. 87-2405, slip op. at 4-8 (7th Cir. June 22, 1988) (no damages where agency relied upon apparently valid and unrevoked written consent to disclose records); Andrews v. VA, 838 F.2d 418, 424-25 (10th Cir. 1988) (standard requires conduct amounting to more than gross negligence [and it must be] "at the very least, reckless behavior"); Reuber v. United States, 829 F.2d 133, 144 (D.C. Cir. 1987) (standard not met as no evidence showed maintenance of record "was anything other than a good-faith effort to preserve an unsolicited and possibly useful piece of information"); Laningham v. United States Navy, 813 F.2d 1236, 1242-43 (D.C. Cir. 1987) (per curiam) (violation must be so "`patently egregious and unlawful'" that anyone undertaking the conduct "`should have known it unlawful'" (quoting Wisdom v. HUD, infra)); Hill v. United States Air Force, 795 F.2d 1067, 1070 (D.C. Cir. 1986) (per curiam) (no damages where no evidence of conduct greater than gross negligence); Moskiewicz v. USDA, 791 F.2d 561, 564 (7th Cir. 1986) (noting that "elements of recklessness often have been a key characteristic incorporated into a definition of willful and intentional conduct" (citing Sorenson v. United States, 521 F.2d 325 (9th Cir. 1975); South v. FBI, 508 F. Supp. 1104 (N.D. Ill. 1981))); Dowd v. IRS, 776 F.2d 1083, 1084 (2d Cir. 1985) (per curiam) ("mere administrative error" in negligently destroying files not a predicate for liability); Chapman v. NASA, 736 F.2d 238, 242-43 (5th Cir. 1984) (per curiam) (standard not met where agency "reasonably could have thought" untimely filing of evaluations was proper; "before our previous opinion `timely' had no precise legal meaning in this circuit"); Albright v. United States, 732 F.2d 181, 189-90 (D.C. Cir. 1984) (standard requires that agency "act without grounds for believing it to be lawful, or by flagrantly disregarding others' rights under the Act"); Wisdom v. HUD, 713 F.2d 422, 424-25 (8th Cir. 1983) (good faith release of loan default records pursuant to unchallenged "Handbook" not willful violation of Act); Perry v. Block, 684 F.2d 121, 129 (D.C. Cir. 1982) (delayed disclosure of documents through administrative oversight not intentional or willful); Edison v. Department of the Army, 672 F.2d 840, 846 (11th Cir. 1982) (failure to prove agency acted "unreasonably" in maintaining records precludes finding intentional or willful conduct); Bruce v. United States, 621 F.2d 914, 917 (8th Cir. 1980) (standard not met where agency relied on regulations permitting disclosure of records pursuant to subpoena, as there were "at that time no regulations or other authority to the contrary"); Porter v. United States Postal Serv., No. CV595-30, slip op. at 10, 13, 21-22 (S.D. Ga. July 24, 1997) (concluding that Postal Service acted with "mere negligence" when it disclosed letter

from plaintiff's attorney written as response to plaintiff's proposed termination to two union officials with belief that they had "a right and duty to know the disciplinary affairs of a fellow postal worker" even though plaintiff had not filed a grievance through union and "had specifically instructed the management that he did not want anyone from the [union] representing his interests") (appeal pending); Purrier v. HHS, No. 95-CV-6203, slip op. at 6-7 (W.D.N.Y. Mar. 15, 1996) ("given [defendant's] knowledge that she was subject to a grand jury subpoena," disclosure of limited information "even if [it] did violate the Act (which, with respect to plaintiff at least, [it] did not), fell far short of the kind of flagrant disregard of plaintiff's rights that is required"); Smith v. United States Bureau of Prisons, No. 94-1798, 1996 WL 43556, at *2 (D.D.C. Jan. 31, 1996) (standard not met where adverse determination had been rectified; fact that certain forms were corrected immediately, even though another form may not have been, "indicates that BOP officials did not intend to maintain plaintiff[']s records incorrectly"); Henson v. Brown, No. 95-213, slip op. at 5-7 (D. Md. June 23, 1995) (disclosure of medical records in response to subpoena signed by judge to attorney for plaintiff's ex-wife, rather than to court, did not "constitute an extreme departure from the standard of ordinary care"); Baitey v. VA, No. 8:CV89-706, slip op. at 8 (D. Neb. June 21, 1995) (standard not met where plaintiff failed to prove that VA acted in "flagrant or reckless disregard of [plaintiff's] rights under the Privacy Act" when it disclosed his medical records in response to incomplete and unsigned medical authorization); Olivares v. NASA, 882 F. Supp. 1545, 1549-50 (D. Md. 1995) (NASA's actions in contacting educational institutions to verify and correct discrepancies in plaintiff's record, even assuming initial consent to contact those institutions was limited, were not even negligent and do not "come close" to meeting standard), aff'd, 103 F.3d 119 (4th Cir. 1996) (unpublished table decision); Webb v. Magaw, 880 F. Supp. 20, 25 (D.D.C. 1995) (stating that even if court had found Privacy Act violation, agency conduct "at worst . . . would only amount to negligence . . . and would not amount to willful, intentional or even reckless disregard"); Sterling v. United States, 826 F. Supp. 570, 572 (D.D.C. 1993) (standard not met where agency's "efforts both before and after the release of information . . . indicate a sensitivity to the potential harm the release might cause and represent attempts to avert that harm"), summary affirmance granted, No. 93-5264 (D.C. Cir. Mar. 11, 1994); Dickson v. OPM, No. 83-3503, slip op. at 38, 39 (D.D.C. Aug. 27, 1991) ("mere negligence" due to failure to follow internal guidelines not enough to show willfulness), summary affirmance granted, No. 91-5363 (D.C. Cir. Aug. 31, 1992); Stephens v. TVA, 754 F. Supp. 579, 582 (E.D. Tenn. 1990) (no damages where

"some authority" existed for proposition that retrieval not initially and directly from system of records was not a "disclosure," and agency attempted to sanitize disclosed records); Brumley v. United States Dep't of Labor, No. 87-2220, slip op. at 6 (D.D.C. Dec. 5, 1990) (no damages for delayed response to amendment request); Alexander v. IRS, No. 86-0414, slip op. at 10-16 (D.D.C. June 30, 1987) (standard not met where agency relied on OMB Guidelines and internal manual in interviewing third parties prior to contacting plaintiff); Blanton v. United States Dep't of Justice, No. 82-0452, slip op. at 6-8 (D.D.C. Feb. 17, 1984) (unauthorized "leak" of record not intentional or willful agency conduct); Krohn v. United States Dep't of Justice, No. 78-1536, slip op. at 3-7 (D.D.C. Nov. 29, 1984) (standard not met where agency relied in good faith on previously unchallenged routine use to publicly file records with court); Daniels v. St. Louis VA Reg'l Office, 561 F. Supp. 250, 252 (E.D. Mo. 1983) (mere delay in disclosure due in part to plaintiff's failure to pay fees not intentional or willful); Doe v. GSA, 544 F. Supp. 530, 541-42 (D. Md. 1982) (disclosure not "wholly unreasonable" where "some kind of consent" given for release of psychiatric records and where agency employees believed that release was authorized under GSA's interpretation of its own guidelines, even though court concluded that such interpretation was erroneous).

While a few district court decisions have found "intentional or willful" violations of the statute, see, e.g., Porter, No. CV595-30, slip op. at 22-23 (S.D. Ga. July 24, 1997); Dong v. Smithsonian Inst., 943 F. Supp. 69, 73-74 (D.D.C. 1996) (appeal pending); Romero-Vargas v. Shalala, 907 F. Supp. 1128, 1133-34 (N.D. Ohio 1995); Swenson v. United States Postal Serv., No. S-87-1282, slip op. at 22-30 (E.D. Cal. Mar. 10, 1994); Connelly v. Comptroller of the Currency, No. H-84-3783, slip op. at 25-27 (S.D. Tex. June 3, 1991); MacDonald v. VA, No. 87-544-CIV-T-15A, slip op. at 4, 7 (M.D. Fla. July 28, 1989); Fitzpatrick v. IRS, 1 Gov't Disclosure Serv. (P-H) ¶ 80,232, at 80,580 (N.D. Ga. Aug. 22, 1980), aff'd in part, vacated & remanded in part, on other grounds, 655 F.2d 327 (11th Cir. 1982); see also Louis v. VA, No. C95-5606, slip op. at 4-5 (W.D. Wash. Oct. 31, 1996) (awarding damages where agency conduct amounted to "reckless disregard" of plaintiff's rights), as yet the only court of appeals to have found "intentional or willful" violations of the statute is the Court of Appeals for the Ninth Circuit, see Wilborn v. HHS, 49 F.3d 597, 602-03 (9th Cir. 1995); Covert v. Harrington, 876 F.2d 751, 756-57 (9th Cir. 1989).

In Wilborn, the plaintiff, an attorney who had been previously employed by the Department of Health and Human Services, sought damages under the Privacy Act for the disclosure of adverse per-

sonnel information about him that was disclosed in an opinion by an Administrative Law Judge before whom he had presented a case. 49 F.3d at 599-602. The court ruled that the "uncontroverted facts plainly establish that the ALJ disclosed the information . . . without any ground for believing it to be lawful and in flagrant disregard of the rights of Wilborn under the Privacy Act." Id. at 602. The Ninth Circuit noted that not only was the ALJ personally familiar with the Privacy Act and had advised his staff concerning the Act's disclosure prohibition, but further, that the ALJ had been informed by an agency attorney that the language at issue was "inappropriate and should not be included in the decision." Id. Particularly troubling in this case is the additional fact that all information pertaining to the adverse personnel record was required to, and in fact had been, removed from the system of records by the ALJ as a result of a grievance action filed by the plaintiff. Id.

In Covert, the Ninth Circuit ruled that the Department of Energy Inspector General's routine use disclosure of prosecutive reports, showing possible criminal fraud, to the Justice Department violated subsection (e)(3)(C) because, at the time of their original collection by another component of the agency, portions of those reports--consisting of personnel security questionnaires submitted by the plaintiffs--did not provide actual notice of the routine use. 876 F.2d 751, 754-57 (9th Cir. 1989). The Ninth Circuit held that the failure to comply with subsection (e)(3)(C) was "greater than grossly negligent" even though the Inspector General was relying on statutes, regulations and disclosure practices that appeared to permit disclosure, and no prior court had ever suggested that noncompliance with subsection (e)(3)(C) would render a subsequent subsection (b)(3) routine use disclosure improper. See id. Though it paid lip service to the correct standard, the Ninth Circuit in Covert actually applied a strict liability standard--one based upon the government's failure to anticipate its novel "linkage" between subsection (e)(3)(C) and subsection (b)(3)--a standard which markedly departs from settled precedent. Compare Covert, 876 F.2d at 756-57, with Chapman, 736 F.2d at 243, Wisdom, 713 F.2d at 424-25, and Bruce, 621 F.2d at 917. See also Doe v. Stephens, 851 F.2d 1457, 1462 (D.C. Cir. 1988) ("We cannot, in short, fairly predicate negligence liability on the basis of the VA's failure to predict the precise statutory interpretation that led this court in [Doe v. DiGenova, 779 F.2d 74, 79-85 (D.C. Cir. 1985)] to reject the agency's reliance on the [law indicating that a subpoena constituted a subsection (b)(11) court order].").

The Court of Appeals for the Third Circuit has held that the Privacy Act--with its stringent

"greater than gross negligence" standard for liability--does not indicate a congressional intent to limit an individual's right under state law to recover damages caused by the merely negligent disclosure of a psychiatric report. See O'Donnell v. United States, 891 F.2d 1079, 1083-87 (3d Cir. 1989) (Federal Tort Claims Act case). But see Hager v. United States, No. 86-3555, slip op. at 7-8 (N.D. Ohio Oct. 20, 1987) (Privacy Act preempts FTCA action alleging wrongful disclosure); cf. Doe v. DiGenova, 642 F. Supp. 624, 629-30, 632 (D.D.C. 1986) (holding state law/FTCA claim preempted by Veterans' Records Statute, 38 U.S.C. §§ 3301-3302 (renumbered as 38 U.S.C. §§ 5701-5702 (1994))), aff'd in pertinent part, rev'd in part & remanded sub nom. Doe v. Stephens, 851 F.2d 1457 (D.C. Cir. 1988).

Assuming that a Privacy Act plaintiff can show: (1) a violation; (2) an adverse effect; (3) causation; and (4) intentional or willful agency conduct, then "actual damages sustained by the [plaintiff are recoverable] but in no case shall a person [who is] entitled to recovery receive less than the sum of $1,000." 5 U.S.C. § 552a(g)(4)(A).

The issue of what kinds of damages are recoverable under subsection (g)(4)(A) has engendered some confusing case law. The OMB Guidelines state that "[a]ctual damages or $1,000, whichever is greater," are/is recoverable. OMB Guidelines, 40 Fed. Reg. 28,948, 28,970 (1975) (emphasis added). Consistent with OMB's guidance, several courts have held that the statutory minimum damages amount of $1,000 is recoverable for "proven injuries"--even in the absence of out-of-pocket expenses (pecuniary loss). See Fitzpatrick v. IRS, 665 F.2d 327-31 (11th Cir. 1982); Leverette v. Federal Law Enforcement Training Ctr., No. CV 280-136, slip op. at 2-5 (S.D. Ga. July 6, 1982).

Two courts have seemed to take this even further by seemingly not requiring "proven injuries." See Wilborn, 49 F.3d at 603 (no need to remand to district court for determination of amount of damages because Wilborn had limited damages sought to statutory minimum of $1,000 (citing Fitzpatrick)); Romero-Vargas, 907 F. Supp. at 1134 (stating that "emotional distress caused by the fact that the plaintiff's privacy has been violated is itself an adverse effect, and . . . statutory damages can be awarded without an independent showing of adverse effects"), motion to alter or amend denied, id. at 1135 (although defendant argued that court had made an error of law in awarding plaintiffs statutory damages in absence of specific findings of mental distress, finding that plaintiffs did present adequate evidence that they were adversely affected by disclosures); cf. Fitzpatrick, 665 F.2d at 330 (although confronted with a case in which appellant had "proved . . . that he suffered

a general mental injury," stating that "$1,000 damage floor" was added as additional element of recovery "[t]o avoid a situation in which persons suffering injury had no provable damages and hence no incentive to sue"); Porter, No. CV595-30, slip op. at 15, 25 (S.D. Ga. July 24, 1997) (finding that because plaintiff had proven intentional and willful violation of his Privacy Act rights, he was entitled to recover statutory minimum of $1,000 even though he had suffered no pecuniary loss and court did not discuss any nonpecuniary loss).

However, a few courts have held that even recovery of the statutory minimum damages amount of $1,000 requires proof of "actual damages"--which, according to these courts, consist only of out-of-pocket expenses. See DiMura v. FBI, 823 F. Supp. 45, 48 (D. Mass. 1993); Nutter v. VA, No. 84-2392, slip op. at 6 n.2 (D.D.C. July 9, 1986); Houston v. United States Dep't of the Treasury, 494 F. Supp. 24, 30 (D.D.C. 1979); see also Mobley v. Doyle, No. JH-87-3300, slip op. at 6 (D. Md. Nov. 8, 1988) (congressional "intention to limit `actual damages' to `out of pocket' expenses"); Pope v. Bond, 641 F. Supp. 489, 500-01 (D.D.C. 1986) (plaintiff's recovery limited to "out-of-pocket" expenses).

With respect to damages beyond the $1,000 level, "actual damages" must be proven. Although it is settled that actual damages include out-of-pocket expenses, there is a split of authority as to whether nonpecuniary damages for physical and mental injury--such as emotional trauma, anger, fear, or fright--are recoverable. Compare Johnson v. Department of the Treasury, IRS, 700 F.2d 971, 974-80 (5th Cir. 1983) (nonpecuniary damages recoverable), Parks, 618 F.2d at 682-83, 685 (stating that plaintiffs had "alleged viable claims for damages" where only alleged adverse effect was "psychological harm"), Dong, 943 F. Supp. at 74 (awarding damages for "direct" and "indirect" injury to plaintiff's reputation); Louis, No. C95-5606, slip op. at 5 (W.D. Wash. Oct. 31, 1996) (awarding damages for "emotional suffering"), Swenson, No. S-87-1282, slip op. at 30-35 (E.D. Cal. Mar. 10, 1994) (following Johnson), and Kassel v. VA, No. 87-217-S, slip op. at 38 (D.N.H. Mar. 30, 1992) (same), with Fitzpatrick, 665 F.2d at 329-31 (damages for generalized mental injuries, loss of reputation, embarrassment or other nonquantifiable injuries not recoverable), Gowan v. Department of the Air Force, No. 90-94, slip op. at 31 (D.N.M. Sept. 1, 1995) (adopting analysis of DiMura that emotional damages are not recoverable) (appeal pending), DiMura, 823 F. Supp. at 47-48 ("`actual damages' does not include emotional damages"), Pope, 641 F. Supp. at 500-01 (only out-of-pocket expenses recoverable), and Houston, 494 F. Supp. at 30 (same).

The Court of Appeals for the District of Columbia Circuit has not expressly ruled on this issue. In Albright v. United States, 558 F. Supp. 260, 264 (D.D.C. 1982), the district court, citing Houston with approval, held that only out-of-pocket expenses--not damages for emotional trauma, anger, fright, or fear--are recoverable. On appeal, however, the D.C. Circuit affirmed on other grounds, expressly declining to decide whether "actual damages" include more than out-of-pocket expenses. Albright, 732 F.2d at 183, 185-86 & n.11.

It is well settled that injunctive relief is available only under subsections (g)(1)(A) (amendment) and (g)(1)(B) (access)--both of which, incidentally, require exhaustion--and that it is not available under subsections (g)(1)(C) or (g)(1)(D). See Doe v. Stephens, 851 F.2d at 1463; Hastings v. Judicial Conference of the United States, 770 F.2d 1093, 1104 (D.C. Cir. 1985); Edison, 672 F.2d at 846; Hanley v. United States Dep't of Justice, 623 F.2d 1138, 1139 (6th Cir. 1980) (per curiam); Parks, 618 F.2d at 684; Cell Assocs. v. NIH, 579 F.2d 1155, 1161-62 (9th Cir. 1978); Purrier, No. 95-CV-6203, slip op. at 5 (W.D.N.Y. Mar. 15, 1996); American Fed'n of Gov't Employees v. HUD, 924 F. Supp. 225, 228 n.7 (D.D.C. 1996), rev'd on other grounds, 118 F.3d 786 (D.C. Cir. 1997); Robinson v. VA, No. 89-1156-B(M), slip op. at 2 (S.D. Cal. Dec. 14, 1989); Houston, 494 F. Supp. at 29; see also Word v. United States, 604 F.2d 1127, 1130 (8th Cir. 1979) (no "exclusionary rule" for subsection (b) violations; "No need and no authority exists to design or grant a remedy exceeding that established in the statutory scheme."); Shields v. Shetler, 682 F. Supp. 1172, 1176 (D. Colo. 1988) (Act "does not create a private right of action to enjoin agency disclosures"); 120 Cong. Rec. 40,406 (1974), reprinted in Source Book at 862. But see Florida Med. Ass'n v. HEW, 479 F. Supp. 1291, 1299 & n.8 (M.D. Fla. 1979) (aberrational decision construing subsection (g)(1)(D) to confer jurisdiction to enjoin agency's disclosure of Privacy Act-protected record).

There should be no reason for regarding this settled law as inapplicable where a subsection (e)(7) claim is involved. See Wabun-Inini v. Sessions, 900 F.2d 1234, 1245 (8th Cir. 1990); Clarkson v. IRS, 678 F.2d 1368, 1375 n.11 (11th Cir. 1982); Committee in Solidarity v. Sessions, 738 F. Supp. 544, 548 (D.D.C. 1990), aff'd, 929 F.2d 742 (D.C. Cir. 1991); see also Socialist Workers Party v. Attorney Gen., 642 F. Supp. 1357, 1431 (S.D.N.Y. 1986) (in absence of exhaustion, only damages remedy, rather than injunctive relief, is available for violation of subsection (e)(7)). In Haase v. Sessions, 893 F.2d 370, 373-75 (D.C. Cir. 1990), however, the D.C. Circuit, in dictum, suggested that its decision in Nagel v. HEW, 725 F.2d 1438, 1441 (D.C. Cir. 1984), could be read to recognize

the availability of injunctive relief to remedy a subsection (e)(7) violation, under subsection (g)(1)(D); cf. Becker v. IRS, 34 F.3d 398, 409 (7th Cir. 1994) (finding that IRS had not justified maintenance of documents under subsection (e)(7) and stating that thus "the documents should be expunged"). Such a view is somewhat difficult to reconcile with the structure of subsection (g) and with the case law mentioned above.

There is a split of authority on the issue of whether destruction of a Privacy Act record gives rise to a damages action. Compare Tufts v. Department of the Air Force, 793 F.2d 259, 261-62 (10th Cir. 1986) (no), with Rosen v. Walters, 719 F.2d 1422, 1424 (9th Cir. 1983) (assuming action exists), and Waldrop v. United States Dep't of the Air Force, 3 Gov't Disclosure Serv. (P-H) ¶ 83,016, at 83,453 (S.D. Ill. Aug. 5, 1981) (yes); see also Dowd v. IRS, 776 F.2d 1083, 1084 (2d Cir. 1985) (per curiam) (expressly declining to decide issue).

F. Principles Applicable to All Privacy Act Civil Actions

1. Attorney Fees and Costs

In amendment lawsuits brought under subsection (g)(1)(A), and access lawsuits brought under subsection (g)(1)(B), attorney fees and costs that are "reasonably incurred" are recoverable, in the court's discretion, if the plaintiff "has substantially prevailed." 5 U.S.C. § 552a(g)(2)(B) (amendment), (g)(3)(B) (access).

In damages lawsuits brought under subsection (g)(1)(C) or subsection (g)(1)(D), "the costs of the action together with reasonable attorney fees as determined by the court" are recoverable by the prevailing plaintiff. 5 U.S.C. § 552a(g)(4)(B). Such an award is not discretionary. See OMB Guidelines, 40 Fed. Reg. 28,948, 28,970 (1975).

comment -- The Privacy Act is one of approximately 100 federal statutes containing a "fee-shifting" provision allowing a prevailing plaintiff to recover attorney fees and costs from the government.

The Supreme Court has held that a pro se attorney may not recover attorney fees under the fee-shifting provision of 42 U.S.C. § 1988 (1994). See Kay v. Ehrler, 499 U.S. 432 (1991). The Court's reasoning in Kay calls into question the propriety of Cazalas v. United States Dep't of Justice, 709 F.2d 1051 (5th Cir. 1983), which addressed the award of attorney fees under the Privacy Act and held that a pro se attorney may recover attorney fees. 709 F.2d at 1052 n.3, 1057.

Although the Supreme Court in Kay did not expressly rule on the issue of the award of attorney fees to nonattorney pro se litigants, the

Court recognized that "the Circuits are in agreement . . . that a pro se litigant who is not a lawyer is not entitled to attorney's fees" and was "satisfied that [those cases so holding] were correctly decided." 499 U.S. at 435. Furthermore, the Court's rationale in Kay would seem to preclude an award of fees to any pro se Privacy Act litigant, as the Court observed that "awards of counsel fees to pro se litigants--even if limited to those who are members of the bar--would create a disincentive to employ counsel" and that "[t]he statutory policy of furthering the successful prosecution of meritorious claims is better served by a rule that creates an incentive to retain counsel in every such case." See id. at 438; see also Wilborn v. HHS, No. 91-538, slip op. at 14-16 (D. Or. Mar. 5, 1996) (rejecting argument that rationale in Kay should be construed as applying only to district court stage of litigation; "policy of the Privacy Act . . . would be better served by a rule that creates an incentive to retain counsel at all stages of the litigation, including appeals"), appeal voluntarily dismissed, No. 96-35569 (9th Cir. June 3, 1996).

Indeed, the Court of Appeals for the District of Columbia Circuit granted summary affirmance to a district court decision which held that a "non-attorney pro se litigant cannot recover attorney's fees under the Privacy Act." Sellers v. United States Bureau of Prisons, No. 87-2048, slip op. at 1 (D.D.C. Jan. 26, 1993), summary affirmance granted, No. 93-5090 (D.C. Cir. July 27, 1993). The district court in Sellers was "persuaded by the Fifth Circuit's opinion in Barrett v. Bureau of Customs, 651 F.2d 1087, 1089 (5th Cir. 1981)," an earlier Privacy Act decision also denying a nonattorney pro se litigant fees, and noted that "[t]he rationale utilized by the Supreme Court in Kay . . . is in accord." Sellers, No. 87-2048, slip op. at 1 (D.D.C. Jan. 26, 1993); see also Smith v. O'Brien, No. 94-41371, slip op. at 4 (5th Cir. June 19, 1995) (per curiam) (citing Barrett and stating: "Pro se litigants are not entitled to attorney fees under either the FOIA or the Privacy Act unless the litigant is also an attorney."); Westendorf v. IRS, No. 3:92-cv-761WS, slip op. at 4 (S.D. Miss. July 7, 1994) (citing Barrett and holding that nonattorney pro se plaintiff is not entitled to attorney fees), appeal dismissed, No. 94-60503, slip op. at 2-3 (5th Cir. Nov. 17, 1994) (stating that district court's holding is correct under Barrett).

In addition, although under the FOIA it has previously been held that a fee enhancement as compensation for the risk in a contingency fee arrangement might be available in limited circumstances, see, e.g., Weisberg v. United States Dep't of Justice, 848 F.2d 1265, 1272 (D.C. Cir.

1988), the Supreme Court has clarified that such enhancements are not available under statutes authorizing an award of reasonable attorney fees to a prevailing or substantially prevailing party, City of Burlington v. Dague, 505 U.S. 557, 561-66 (1992) (prohibiting contingency enhancement in environmental fee-shifting statutes); see also King v. Palmer, 950 F.2d 771, 775 (D.C. Cir. 1991) (en banc) (pre-City of Burlington case anticipating result later reached by Supreme Court). In light of the Court's further observation that case law "construing what is a `reasonable' fee applies uniformly to all [federal fee-shifting statutes]," there seems to be little doubt that the same principle also prohibits fee enhancements under the Privacy Act.

Attorney fees are not recoverable for services rendered at the administrative level. See Kennedy v. Andrus, 459 F. Supp. 240, 244 (D.D.C. 1978), aff'd, 612 F.2d 586 (D.C. Cir. 1980) (unpublished table decision).

The D.C. Circuit has held that attorney fees are not available in a subsection (g)(1)(A) amendment case unless the plaintiff has exhausted his administrative remedies. See Haase v. Sessions, 893 F.2d 370, 373-75 (D.C. Cir. 1990).

Subsection (g)(3)(B) is similar to 5 U.S.C. § 552(a)(4)(E), the FOIA's attorney fees provision, so FOIA decisions concerning attorney fees should be consulted in this area. For a discussion of current decisions, see the section of the "Justice Department Guide to the Freedom of Information Act" entitled "Litigation Considerations, Attorney Fees and Litigation Costs."

Litigation costs (if reasonably incurred) can be recovered by all plaintiffs who substantially prevail. See Parkinson v. Commissioner, No. 87-3219, slip op. at 5 (6th Cir. Feb. 17, 1988); Young v. CIA, No. 91-527-A, slip op. at 2 (E.D. Va. Nov. 30, 1992), aff'd, 1 F.3d 1235 (4th Cir. 1993) (unpublished table decision). Compare Herring v. VA, No. 94-55955, 1996 WL 32147, at **5-6 (9th Cir. Jan. 26, 1996) (although ruling in favor of VA on plaintiff's access claim, nonetheless finding that plaintiff was "a prevailing party with respect to her access claim" because "the VA did not provide her access to all her records until she filed her lawsuit"), with Abernethy v. IRS, 909 F. Supp. 1562, 1567-69 (N.D. Ga. 1995) ("[T]he fact that records were released after the lawsuit was filed, in and of itself, is insufficient to establish Plaintiff's eligibility for an award of attorneys' fees."), aff'd, No. 95-9489 (11th Cir. Feb. 13, 1997).

"Judgments, costs, and attorney's fees assessed against the United States under [subsection (g) of the Privacy Act] would appear to be payable from the public funds rather than from agency funds." OMB Guidelines, 40 Fed. Reg. 28,948, 28,968 (1975) (citing 28 U.S.C. § 2414 (1994 & Supp. I 1995); 31 U.S.C. § 724a (later replaced during enactment of revised Title 31, now see 31 U.S.C. § 1304 (1994 & Supp. I 1995) (first sentence of former § 724a) and 39 U.S.C. § 409(e) (1994) (last sentence of former § 724a)); and 28 U.S.C. § 1924 (1994)).

2. Jurisdiction and Venue

"An action to enforce any liability created under this section may be brought in the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia." 5 U.S.C. § 552a(g)(5).

comment -- By its very terms, this section limits jurisdiction over Privacy Act matters to the federal district courts. 5 U.S.C. § 552a(g)(5); see also, e.g., Minnich v. MSPB, No. 94-3587, 1995 U.S. App. LEXIS 5768, at *3 (Fed. Cir. Mar. 21, 1995) (per curiam) (MSPB does not have jurisdiction over Privacy Act claims); Frasier v. United States, No. 94-5131, 1994 U.S. App. LEXIS 35392, at *3 (Fed. Cir. Dec. 6, 1994) ("U.S. Court of Federal Claims does not have jurisdiction over Privacy Act matters").

Because venue is always proper in the District of Columbia, the Privacy Act decisions of the Court of Appeals for the District of Columbia Circuit are of great importance.

For cases involving this provision, see Akutowicz v. United States, 859 F.2d 1122, 1126 (2d Cir. 1988) (venue proper only in District of Columbia for plaintiff who resided and worked continuously in France), and Finley v. National Endowment for the Arts, 795 F. Supp. 1457, 1467 (C.D. Cal. 1992) ("[I]n a multi-plaintiff Privacy Act action, if any plaintiff satisfies the venue requirement of 5 U.S.C. § 552a(g)(5), the venue requirement is satisfied as to the remaining plaintiffs.").

3. Statute of Limitations

"An action to enforce any liability created under this section may be brought . . . within two years from the date on which the cause of action arises, except that where an agency has materially and willfully misrepresented any information required under this section to be disclosed to an individual and the information so misrepresented is material to establishment of the liability of the agency to the individual under this section, the action may be brought at any time within two years after discovery by the individual

of the misrepresentation. Nothing in this section shall be construed to authorize any civil action by reason of any injury sustained as the result of a disclosure of a record prior to September 27, 1975." 5 U.S.C. § 552a(g)(5).

comment -- The statute of limitations is jurisdictional in nature and must be strictly construed as it is an "`integral condition of the sovereign's consent to be sued under the Privacy Act.'" Bowyer v. United States Dep't of the Air Force, 875 F.2d 632, 635 (7th Cir. 1989) (quoting Diliberti v. United States, 817 F.2d 1259, 1262 (7th Cir. 1987)); accord Williams v. Reno, No. 95-5155, 1996 WL 460093, at *1 (D.C. Cir. Aug. 7, 1996); Akutowicz v. United States, 859 F.2d 1122, 1126 (2d Cir. 1988); Davis v. Gross, No. 83-5223, slip op. at 2-3 (6th Cir. May 10, 1984); Munson v. Department of Justice, No. 96-CV-70920-DT, slip op. at 1 (E.D. Mich. July 2, 1996); Mangino v. Department of the Army, 818 F. Supp. 1432, 1437 (D. Kan. 1993), aff'd, 17 F.3d 1437 (10th Cir. 1994) (unpublished table decision).

Amendment

The Court of Appeals for the Ninth Circuit has held that when a subsection (g)(1)(A) amendment action is involved, the limitations period commences "at the time that a person knows or has reason to know that the request has been denied," rather than as of the date of the request letter. Englerius v. VA, 837 F.2d 895, 897-98 (9th Cir. 1988). In so holding, the Ninth Circuit noted that "[w]here the agency has not issued an express denial of the request, the question when a person learns of the denial requires a factual inquiry and cannot ordinarily be decided on a motion to dismiss." Id.; cf. Jarrell v. United States Postal Serv., 753 F.2d 1088, 1092 (D.C. Cir. 1985) (holding that issue of material fact existed and therefore summary judgment was inappropriate where agency contended that cause of action arose when it issued final denial of expungement request but requester argued that due to agency's excision of certain parts of documents, he was unaware of information until later point in time).

The Court of Appeals for the Fourth Circuit endorsed a stricter interpretation when it deemed as "correct" a district court determination that the statute of limitations ran from the time that the plaintiff sent his first letter requesting amendment, as at such time "he should have known of the alleged violation." Wills v. OPM, No. 93-2079, slip op. at 2-3 (4th Cir. Jan. 28, 1994) (alternative holding) (per curiam).

One district court has held that the limitations period for a subsection (g)(1)(A) amendment action commences as of the date of the agency's initial denial rather than as of the date of the agency's administrative appeal determination. See Quarry v. Department of Justice, 3 Gov't Disclosure Serv. (P-H) ¶ 82,407, at 83,020-21 (D.D.C. Feb. 2, 1982); see also Singer v. OPM, No. 83-1095, slip op. at 2 (D.N.J. Mar. 8, 1984) (rejecting claim that limitations period began on date plaintiff's appeal was dismissed as time-barred under agency regulation); cf. Shannon v. General Elec. Co., 812 F. Supp. 308, 320 & n.10 (N.D.N.Y. 1993) (finding that cause of action for damages claim arose when plaintiff's amendment request was partially denied and noting that "no case-law can be found to support a finding that the pendency of the appeal has any affect upon the running of the statute of limitations").

Access

The two-year statute of limitations set forth in subsection (g)(5) applies to the access pro-

vision of the Privacy Act as well. 5 U.S.C. § 552a(g)(5). However, because an individual's Privacy Act access request should be processed under the FOIA as well--see H.R. Rep. No. 98-726, pt. 2, at 16-17 (1984), reprinted in 1984 U.S.C.C.A.N. 3741, 3790-91 (regarding amendment of Privacy Act in 1984 to include subsection (t)(2) and stating: "Agencies that had made it a practice to treat a request made under either [the Privacy Act or the FOIA] as if the request had been made under both laws should continue to do so."); FOIA Update, Winter 1986, at 6--and the FOIA is subject to the general six-year statute of limitations, see Spannaus v. Department of Justice, 824 F.2d 52, 55-56 (D.C. Cir. 1987) (applying 28 U.S.C. § 2401(a) to FOIA actions), the Privacy Act's "two-year bar" may be of little, if any, consequence. The ramifications of these arguably conflicting provisions have not been explored.

Indeed, only three decisions have addressed the Privacy Act's statute of limitations in the access context. See Biondo v. Department of the Navy, 928 F. Supp. 626, 632, 634-35 (D.S.C. 1995) (summarily stating that 1987 request "cannot serve as a basis for relief for a suit brought in 1992 because the Privacy Act has a two-year statute of limitations"; similar statements made as to undocumented requests for information in mid-80's and in 1976-77), aff'd, 86 F.3d 1148 (4th Cir. 1996) (unpublished table decision); Burkins v. United States, 865 F. Supp. 1480, 1496 (D. Colo. 1994) (cause of action "should not be time-barred" because it would have accrued when plaintiff knew his request for access had been denied); Mittleman v. United States Treasury, 773 F. Supp. 442, 448, 450-51 n.7 (D.D.C. 1991) (where claims barred by statute of limitations, plaintiff "cannot attempt to resurrect" them by making subsequent request more than three years after she had first received information and almost six months after complaint had been filed), related subsequent case, Mittleman v. OPM, No. 92-158, slip op. at 1 n.1 (D.D.C. Jan. 18, 1995), summary affirmance granted, 76 F.3d 1240, 1242 (D.C. Cir. 1996).

Damages

The Court of Appeals for the Seventh Circuit has adopted an extremely strict standard for determining when the limitations period commences for a damages action brought under subsections (g)(1)(C) and/or (g)(1)(D) for violation of subsection (e)(5). See Bowyer v. United States Dep't of the Air Force, 875 F.2d 632, 636-39 (7th Cir. 1989); Diliberti v. United States, 817 F.2d 1259, 1262-64 (7th Cir. 1987). In each case, the Seventh Circuit held that the limitations period begins to run when "the

plaintiff first knew or had reason to know that the private records were being maintained." Bowyer, 875 F.2d at 636; Diliberti, 817 F.2d at 1262. In the Seventh Circuit's view, a plaintiff, upon knowing or having reason to know of a record's existence, even if based upon hearsay or rumors, has a "duty to inquire" into the matter--i.e., "two years from that time to investigate whether sufficient factual and legal bases existed for bringing suit." Bowyer, 875 F.2d at 636-37; accord Diliberti, 817 F.2d at 1264; Munson, No. 96-CV-70920-DT, slip op. at 2-3 (E.D. Mich. July 2, 1996) (quoting Diliberti); Mangino, 818 F. Supp. at 1438.

In both Bowyer and Diliberti, the Seventh Circuit rejected several alternative theories about when the limitations period could be deemed to commence: (1) at the time a plaintiff gains physical possession of the records; (2) at the time a plaintiff knows or has reason to know the records are erroneous or otherwise improperly maintained; and (3) at the time an adverse determination based on the records occurs. Bowyer, 875 F.2d at 636-38; Diliberti, 817 F.2d at 1262-64; see also Nwangoro v. Department of the Army, 952 F. Supp. 394, 397-98 (N.D. Tex. 1996) ("[T]he limitation period commences not when the plaintiff first obtains possession of the particular records at issue, but rather when he first knew of their existence."); Strang v. Indahl, No. 93-97, slip op. at 2-4 (M.D. Ga. Apr. 13, 1995) ("The statute does not await confirmation or actual access to the records; hearsay and rumor are sufficient to begin running the statute of limitations."); Committee in Solidarity v. Sessions, 738 F. Supp. 544, 548 (D.D.C. 1990) (following Diliberti), aff'd, 929 F.2d 742 (D.C. Cir. 1991); Rickard v. United States Postal Serv., No. 87-1212, slip op. at 5 (C.D. Ill. Feb. 16, 1990) (same); Ertell v. Department of the Army, 626 F. Supp. 903, 908 (C.D. Ill. 1986) (limitations period commences when plaintiff "knew" that there "had been negative evaluations in his file which may explain why he is not being selected," rather than upon actual discovery of such records); cf. Szymanski v. United States Parole Comm'n, 870 F. Supp. 377, 378-79 (D.D.C. 1994) (although finding that plaintiff had complained about same information in his appeal to Parole Commission more than two years previously, stating also that claim was time-barred because plaintiff had been given opportunity to review documents and waived that opportunity and thus should have known about any errors at time of waiver).

Although applying a stricter standard, Bowyer and Diliberti relied upon Bergman v. United States, 751 F.2d 314, 316-17 (10th Cir. 1984), in which the Court of Appeals for the Tenth

Circuit held that the limitations period for a damages action under subsection (g)(1)(C) commences at the time three conditions are met: (1) an error was made in maintaining plaintiff's records; (2) plaintiff was wronged by such error; and (3) plaintiff either knew or had reason to know of such error. See also Mangino, 818 F. Supp. at 1437-38 (applying Bergman, Bowyer, and Diliberti, and finding that cause of action accrued on date of letter in which plaintiff indicated knowledge of records being used by agency as basis for revoking his security clearance, rather than upon his receipt of records); Szymanski v. United States Parole Comm'n, 870 F. Supp. 377, 378-79 (D.D.C. 1994) (citing Bergman and Tijerina and stating that "[b]ecause plaintiff was given the opportunity to review the documents he now maintains contain incorrect information and waived that opportunity, the Court finds that he should have known about any errors at the time of this waiver" but that, additionally, plaintiff had complained about the same information in his appeal to Parole Commission more than two years previously); Malewich v. United States Postal Serv., No. 91-4871, slip op. at 21-22 (D.N.J. Apr. 8, 1993) (statute began to run when plaintiff was aware that file was being used in investigation of plaintiff and when he was notified of proposed termination of employment), aff'd, 27 F.3d 557 (3d Cir. 1994) (unpublished table decision).

In Bergman, the Tenth Circuit ruled that the limitations period commenced when the agency first notified plaintiff in writing that it would not reconsider his discharge or correct his job classification records, and rejected the argument "that a new cause of action arose upon each and every subsequent adverse determination based on erroneous records." 751 F.2d at 316-17; see also Diliberti, 817 F.2d at 1264 (citing Bergman and rejecting argument that continuing violation doctrine should toll statute of limitations); Bowyer, 875 F.2d at 638 (citing Bergman and Diliberti for same proposition); Malewich, No. 91-4871, slip op. at 23-25 (D.N.J. Apr. 8, 1993) (same); Shannon v. General Elec. Co., 812 F. Supp. 308, 319-20 (N.D.N.Y. 1993) (because plaintiff knew of error in records when his amendment request was partially denied, "at which time he also should have realized that the error was potentially harmful," cause of action for adverse impact of those records on his security rating arose when amendment request was partially denied; plaintiff "cannot revive a potential cause of action simply because the violation continued to occur; he can allege subsequent violations only if there are subsequent events that occurred in violation of the Privacy Act"); cf. Baker v. United States, 943 F. Supp. 270, 273 (W.D.N.Y.

1996) (citing Shannon with approval). But cf. Burkins v. United States, 865 F. Supp. 1480, 1496 (D. Colo. 1994) (citing Bergman and viewing plaintiff's harm as "continuing transaction").

In contrast to Bowyer, Diliberti, and Bergman, the Court of Appeals for the Second Circuit has suggested that the limitations period for a subsection (g)(1)(C) damages action would commence when a plaintiff actually receives his record--i.e., when he discovers the inaccuracy. Akutowicz v. United States, 859 F.2d 1122, 1126 (2d Cir. 1988); see also Rose v. United States, 905 F.2d 1257, 1259 (9th Cir. 1990) (subsection (g)(1)(C) action accrues when reasonable person "knows or has reason to know of the alleged violation" and that period commenced when plaintiff received copy of his file); Lepkowski v. United States Dep't of the Treasury, 804 F.2d 1310, 1322-23 (D.C. Cir. 1986) (Robinson, J., concurring) (subsection (g)(1)(C) action "accrued no later than the date upon which [plaintiff] received IRS' letter . . . apprising him of destruction of the photographs and associated workpapers"); Harry v. United States Postal Serv., 867 F. Supp. 1199, 1205 (M.D. Pa. 1994) (although exact date when plaintiff should have known about alleged improper file maintenance was unclear, date of actual discovery was "sterling clear"--when plaintiff physically reviewed his files); Shannon, 812 F. Supp. at 319-20 (causes of action arose when plaintiff learned of wrongs allegedly committed against him which was when he received documents that were allegedly inaccurate or wrongfully maintained); Fiorella v. HEW, 2 Gov't Disclosure Serv. (P-H) ¶ 81,363, at 81,944 (W.D. Wash. Mar. 9, 1981); cf. Steele v. Cochran, No. 95-35373, 1996 WL 285651, at *1 (9th Cir. May 29, 1996) (citing Rose and holding that Privacy Act claim filed in 1994 was time-barred because plaintiff wrote letter to agency questioning validity of information disclosed to State Bar in 1991 and was formally informed by State Bar that he was denied admission in 1991).

The Court of Appeals for the District of Columbia Circuit has held that the limitations period for a subsection (g)(1)(D) damages action for "wrongful disclosure" in violation of subsection (b) commences when the plaintiff "`know[s] or ha[s] reason to know that the adverse action occurred.'" Tijerina v. Walters, 821 F.2d 789, 797 (D.C. Cir. 1987) (quoting Pope v. Bond, 641 F. Supp. 489, 499-500 (D.D.C. 1986)). In rejecting the government's argument that the limitations period commences when the contested disclosure occurs, the D.C. Circuit observed that such an unauthorized disclosure "is unlikely to come to the subject's attention

until it affects him adversely, if then." 821 F.2d at 797. Cf. Williams v. Reno, No. 95-5155, 1996 WL 460093, at *1 (D.C. Cir. Aug. 7, 1996) (citing Tijerina and stating that action "arises when the plaintiff knew or should have known of the alleged violation"); Brown v. VA, No. 94-1119, 1996 WL 263636, at **1-2 (D.D.C. May 15, 1996) (Privacy Act claim barred by statute of limitations because plaintiff "knew or should have known that the Privacy Act may have been violated" when he submitted federal tort claim to VA concerning same matter "over two and a half years" before suit filed); Gordon v. Department of Justice, Fed. Bureau of Prisons, No. 94-2636, 1995 WL 472360, at *2 (D.D.C. Aug. 3, 1995) (statute of limitations ran from time of plaintiff's receipt of letter from sentencing judge rejecting information contained in presentencing report, at which point plaintiff "knew or . . . should have known what became inaccuracies in his presentencing report"); Rice v. Hawk, No. 94-1519, slip op. at 2-3 & n.1 (D.D.C. Dec. 30, 1994) (plaintiff knew of contents of presentence report at time he filed "Objection to Presentence Investigation Report," at which time statute of limitations began to run), summary affirmance granted, No. 95-5027, 1195 WL 551148 (D.C. Cir. Aug. 2, 1995); Szymanski, 870 F. Supp. at 378-79 (citing Bergman and Tijerina and stating that "[b]ecause plaintiff was given the opportunity to review the documents he now maintains contain incorrect information and waived that opportunity, the Court finds that he should have known about any errors at the time of this waiver" but that, additionally, plaintiff had complained about same information in his appeal to Parole Commission more than two years previously).

Note also that the statute's own terms provide that if the plaintiff remains unaware of his cause of action because of the agency's material and willful misrepresentations of information required by the statute to be disclosed to him and the information is material to establishment of the liability of the agency to the individual, then the limitations period runs from the date upon which the plaintiff discovers the misrepresentation. 5 U.S.C. § 552a(g)(5); see also Tijerina, 821 F.2d at 797-98; Burkins, 865 F. Supp. at 1496; Pope, 641 F. Supp. at 500; cf. Munson, No. 96-CV-70920-DT, slip op. at 4-5 (E.D. Mich. July 2, 1996) (statement that agency could find no record of disclosure of report to state police but that it would check further "does not provide any evidence of a willful and material misrepresentation"); Strang v. Indahl, No. 93-97, slip op. at 2-4 (M.D. Ga. Apr. 13, 1995) (agency's denial of allegations in plaintiff's complaint did not equate as material misrepre-

sentation; by voluntarily dismissing suit on belief that reliance on circumstantial evidence was insufficient, plaintiff "elected to forego the very lawsuit which would have . . . substantiated her suspicions").

The Seventh Circuit has stated, however, that this special relief provision is necessarily incorporated into tests, such as the one set forth in Bergman, that focus on when a plaintiff first knew or had reason to know of an error in maintaining his records. Diliberti, 817 F.2d at 1262 n.1; see also Malewich, No. 91-4871, slip op. at 25-27 (D.N.J. Apr. 8, 1993). In Tijerina v. Walters, 821 F.2d 789, 797-98 (D.C. Cir. 1987), the government presented essentially this view to the D.C. Circuit. Although the court ultimately held that "in a normal Privacy Act claim, the cause of action does not arise and the statute of limitations does not begin to run until the plaintiff knows or should know of the alleged violation," the government had argued that by so holding, the D.C. Circuit would be reading out of existence the clause providing for a more liberal limitations period in cases of willful misrepresentation. Id. The D.C. Circuit rejected that argument and stated that in order to ensure that the government cannot escape liability by purposefully misrepresenting information, "the Act allows the period to commence upon actual discovery of the misrepresentation, whereas . . . for other actions under the Act, the period begins when the plaintiff knew or should have known of the violation . . . thus in no way affect[ing] the special treatment Congress provided for the particularly egregious cases of government misconduct singled out in the Act's statute of limitations." Id. at 798.

One district court decision has also considered the statute of limitations in connection with a Privacy Act claim under subsection (e)(3) concerning the collection of information from individuals. Darby v. Jensen, No. 94-S-569, 1995 U.S. Dist. LEXIS 7007, at **7-8 (D. Colo. May 15, 1995). In that case, the court determined that the claim was time-barred, as more than two years had passed since the date upon which the plaintiff had received the request for information. Id.

Another district court decision found that because no administrative exhaustion requirement exists before a damages action can be brought, voluntary pursuit of administrative procedures should not toll the running of the statute of limitations. See Uhl v. Swanstrom, 876 F. Supp. 1545, 1560-61 (N.D. Iowa 1995), aff'd on other grounds, 79 F.3d 751 (8th Cir. 1996).

4. Jury Trial

The Act is silent on this point, but every court to have considered the issue has ruled that there is no right to a jury trial under the statute. See Harris v. USDA, No. 96-5783, 1997 U.S. App. LEXIS 22839, at **8-9 (6th Cir. Aug. 26, 1997); Clarkson v. IRS, No. 8:88-3036-3K, slip op. at 8 (D.S.C. May 10, 1990), aff'd, 935 F.2d 1285 (4th Cir. 1991) (unpublished table decision); Williams v. United States, No. H-80-249, slip op. at 13-14 (D. Conn. Apr. 10, 1984); Calhoun v. Wells, 3 Gov't Disclosure Serv. (P-H) ¶ 83,272, at 84,059 n.2 (D.S.C. July 30, 1980); Henson v. United States Army, No. 76-45-C5, slip op. at 2-7 (D. Kan. Mar. 16, 1977).

CRIMINAL PENALTIES

"Any officer or employee of an agency, who by virtue of his employment or official position, has possession of, or access to, agency records which contain individually identifiable information the disclosure of which is prohibited by this section or by rules or regulations established thereunder, and who knowing that disclosure of the specific material is so prohibited, willfully discloses the material in any manner to any person or agency not entitled to receive it, shall be guilty of a misdemeanor and fined not more than $5,000." 5 U.S.C. § 552a(i)(1).

"Any officer or employee of any agency who willfully maintains a system of records without meeting the notice requirements of subsection (e)(4) of this section shall be guilty of a misdemeanor and fined not more than $5,000." 5 U.S.C. § 552a(i)(2).

"Any person who knowingly and willfully requests or obtains any record concerning an individual from an agency under false pretenses shall be guilty of a misdemeanor and fined not more than $5,000." 5 U.S.C. § 552a(i)(3).

comment -- These provisions are solely penal and create no private right of action. See Jones v. Farm Credit Admin., No. 86-2243, slip op. at 3 (8th Cir. Apr. 13, 1987); Unt v. Aerospace Corp., 765 F.2d 1440, 1448 (9th Cir. 1985); McNeill v. IRS, No. 93-2204, slip op. at 7 (D.D.C. Feb. 7, 1995); Lapin v. Taylor, 475 F. Supp. 446, 448 (D. Haw. 1979); see also FLRA v. DOD, 977 F.2d 545, 549 n.6 (11th Cir. 1992) (dictum); Beckette v. United States Postal Serv., No. 88-802, slip op. at 14 n.14 (E.D. Va. July 3, 1989); Kassel v. VA, 682 F. Supp. 646, 657 (D.N.H. 1988); Bernson v. ICC, 625 F. Supp. 10, 13 (D. Mass. 1984).

There has been at least one criminal prosecution for unlawful disclosure of Privacy Act-protected records. See United States v. Gonzalez, No. 76-132 (M.D. La. Dec. 21, 1976). See generally In re Mullins (Tamposi Fee Application), 84 F.3d 1439, 1441 (D.C. Cir. 1996) (per curiam) (case concerning application for reimbursement of attorney fees where Independent Counsel found no prosecution was warranted under Privacy Act because there was no conclusive evidence of improper disclosure of information).

TEN EXEMPTIONS

A. One Special Exemption--5 U.S.C. § 552a(d)(5)

"nothing in this [Act] shall allow an individual access to any information compiled in reasonable anticipation of a civil action or proceeding."

comment -- The subsection (d)(5) provision is sometimes mistakenly overlooked because it is not located with the other exemptions in sections (j) and (k). It is an exemption from only the access provision of the Privacy Act.

This exemption provision reflects Congress's intent to exclude civil litigation files from access under subsection (d)(1). See 120 Cong. Rec. 36,959-60 (1974), reprinted in Source Book at 936-38. Indeed, this Privacy Act provision has been held to be similar to the attorney work-product privilege, see, e.g., Martin v. Office of Special Counsel, 819 F.2d 1181, 1187-89 (D.C. Cir. 1987); Hernandez v. Alexander, 671 F.2d 402, 408 (10th Cir. 1982); Barber v. INS, No. 90-0067C, slip op. at 4-6 (W.D. Wash. May 15, 1990), and to extend even to information prepared by nonattorneys, see Smiertka v. United States Dep't of the Treasury, 447 F. Supp. 221, 227-28 (D.D.C. 1978) (broadly construing subsection (d)(5) to cover documents prepared by and at direction of lay agency staff persons during period prior to plaintiff's firing), remanded on other grounds, 604 F.2d 698 (D.C. Cir. 1979); see also Taylor v. United States Dep't of Educ., No. 91 N 837, slip op. at 3, 6 (D. Colo. Feb. 25, 1994) (applying subsection (d)(5) to private citizen's complaint letter maintained by plaintiff's supervisor in anticipation of plaintiff's termination); Government Accountability Project v. Office of Special Counsel, No. 87-0235, slip op. at 10-11 (D.D.C. Feb. 22, 1988) (subsection (d)(5) "extends to any records compiled in anticipation of civil proceedings, whether prepared by attorneys or lay investigators"); Crooker v. Marshals Serv., No. 85-2599, slip op. at 2-3 (D.D.C. Dec. 16, 1985) (subsection (d)(5) protects information "regardless of whether it was prepared by an attorney"); Barrett v. Customs Serv., No. 77-3033, slip op. at 2-3 (E.D. La. Feb. 22, 1979) (applying subsection (d)(5) to "policy recommendations regarding plaintiff['s] separation from the Customs Service and the possibility of a sex discrimination action").

This provision shields information that is compiled in anticipation of court proceedings and quasi-judicial administrative hearings. See, e.g., Martin, 819 F.2d at 1188-89; Frets v. Department of Transp., No. 88-0404-CV-W-9, slip op. at 11 (W.D. Mo. Dec. 14, 1988); see also OMB Guidelines, 40 Fed. Reg. 28,948, 28,960 (1975)

("civil proceeding" term intended to cover "quasi-judicial and preliminary judicial steps").

It should be noted, however, that this provision is in certain respects not as broad as Exemption 5 of the Freedom of Information Act, 5 U.S.C. § 552(b)(5) (1994), as amended by Electronic Freedom of Information Act Amendments of 1996, 5 U.S.C.A. § 552 (West Supp. 1997). For example, by its terms it does not cover information compiled in anticipation of criminal actions. Of course, subsection (j)(2), discussed below, may provide protection for such information. Also, subsection (d)(5) does not incorporate other Exemption 5 privileges, such as the deliberative process privilege. See, e.g., Savada v. DOD, 755 F. Supp. 6, 9 (D.D.C. 1991). This means that deliberative information regularly withheld under the FOIA can be required to be disclosed under the Privacy Act. See, e.g., id.; see also FOIA Update, Spring 1994, at 5-6 (encouraging discretionary disclosure of attorney work-product information under FOIA Exemption 5).

Unlike all of the other Privacy Act exemptions discussed below, however, subsection (d)(5) is entirely "self-executing," inasmuch as it does not require an implementing regulation in order to be effective. Cf. Mervin v. Bonfanti, 410 F. Supp. 1205, 1207 (D.D.C. 1976) ("[A]n absolute prerequisite for taking advantage of [exemption (k)(5)] is that the head of the particular agency promulgate a rule.").

B. Two General Exemptions--5 U.S.C. § 552a(j)

"The head of any agency may promulgate rules, in accordance with the requirements (including general notice) of sections 553(b)(1), (2), and (3), (c), and (e) of this title, to exempt any system of records within the agency from any part of this section except subsections (b), (c)(1) and (2), (e)(4)(A) through (F), (e)(6), (7), (9), (10), and (11), and (i) if the system of records is--

(1) maintained by the Central Intelligence Agency; or

(2) maintained by an agency or component thereof which performs as its principal function any activity pertaining to the enforcement of criminal laws, including police efforts to prevent, control, or reduce crime or to apprehend criminals, and the activities of prosecutors, courts, correctional, probation, pardon, or parole authorities, and which consists of

(A) information compiled for the purpose of identifying individual criminal offenders and alleged offenders and consisting only of identifying data and notations of arrests, the nature and disposition of criminal charges, sentencing, confinement, release, and parole and probation status;

(B) information compiled for the purpose of a criminal investigation, including reports of informants and investigators, and associated with an identifiable individual; or

(C) reports identifiable to an individual compiled at any stage of the process of enforcement of the criminal laws from arrest or indictment through release from supervision.

At the time rules are adopted under this subsection, the agency shall include in the statement required under section 553(c) of this title, the reasons why the system of records is to be exempted from a provision of this section."

comment -- For cases involving subsection (j)(1), see Alford v. CIA, 610 F.2d 348, 348-49 (5th Cir. 1980), Hunsberger v. CIA, No. 92-2186, slip op. at 2-3 (D.D.C. Apr. 5, 1995); Wilson v. CIA, No. 89-3356, slip op. at 2-3 (D.D.C. Oct. 15, 1991), Bryant v. CIA, No. 90-1163, slip op. at 2 (D.D.C. June 28, 1991), and Anthony v. CIA, 1 Gov't Disclosure Serv. (P-H) ¶ 79,196, at 79,371 (E.D. Va. Sept. 19, 1979).

Subsection (j)(2)'s threshold requirement is that the system of records be maintained by "an agency or component thereof which performs as its principal function any activity pertaining to the enforcement of criminal laws." This requirement is usually met by such obvious law enforcement components as the FBI, DEA, and ATF. In addition, Department of Justice components such as the Federal Bureau of Prisons, see, e.g., Kellett v.

United States Bureau of Prisons, No. 94-1898, 1995 U.S. App. LEXIS 26746, at **10-11 (1st Cir. Sept. 18, 1995) (per curiam); Duffin v. Carlson, 636 F.2d 709, 711 (D.C. Cir. 1980), the United States Attorney's Office, see, e.g., Hatcher v. United States Dep't of Justice Office of Info. & Privacy Act, 910 F. Supp. 1, 2-3 (D.D.C. 1995), and the Office of the Pardon Attorney, see, e.g., Binion v. United States Dep't of Justice, 695 F.2d 1189, 1191 (9th Cir. 1983), as well as the U.S. Parole Commission, see, e.g., Fendler v. United States Parole Comm'n, 774 F.2d 975, 979 (9th Cir. 1985); James v. Baer, No. 89-2841, slip op. at 2-3 (D.D.C. May 11, 1990), a United States Postal Service component, the Postal Inspection Service, see Dorman v. Mulligan, No. 92 C 3230 (N.D. Ill. Sept. 23, 1992), and the Air Force Office of Special Investigations, see Butler v. Department of the Air Force, 888 F. Supp. 174, 179 (D.D.C. 1995), aff'd per curiam, No. 96-5111 (D.C. Cir. May 6, 1997), also qualify to use subsection (j)(2).

However, it has been held that the threshold requirement is not met where only one of the principal functions of the component maintaining the system is criminal law enforcement. See Alexander v. IRS, No. 86-0414, slip op. at 8-9 (D.D.C. June 30, 1987) (IRS Inspection Service's internal "conduct investigation" system); Anderson v. United States Dep't of the Treasury, No. 76-1404, slip op. at 6-7 (D.D.C. July 19, 1977) (same). Two courts have held that an Inspector General's Office qualifies as a "principal function" criminal law enforcement component. See Taylor v. United States Dep't of Educ., No. 91 N 837, slip op. at 5 (D. Colo. Feb. 25, 1994); Von Tempske v. HHS, 2 Gov't Disclosure Serv. (P-H) ¶ 82,091, at 82,385 (W.D. Mo. Nov. 11, 1981) (IG's office qualifies to use subsection (j)(2), but records at issue did not fall within subsection (j)(2)(B) as they were compiled for "administrative" rather than "criminal" investigative purpose).

Once the threshold requirement is satisfied, it must be shown that the system of records at issue consists of information compiled for one of the criminal law enforcement purposes listed in subsection (j)(2)(A)-(C). Given the breadth of this exemption, an agency's burden of proof is generally less stringent than under the FOIA, at least in the access context. Indeed, several courts have observed that "the Vaughn rationale [requiring itemized indices of withheld records] is probably inapplicable to Privacy Act cases where a general exemption has been established." Restrepo v. United States Dep't of Justice, No. 5-86-294, slip op. at 6 (D. Minn. June 23, 1987) (citing Shapiro v. DEA, 721 F.2d 215, 218 (7th Cir. 1983), vacated as moot, 469 U.S. 14 (1984)); see also Miller v. Director of FBI, No. 77-C-3331, slip op. at 7 (N.D. Ill. Oct. 7, 1987); Welsh v. IRS, No.

85-1024, slip op. at 3-4 (D.N.M. Oct. 21, 1986). Moreover, in access cases the Act does not grant courts the authority to review the information at issue in camera to determine whether subsection (j)(2)(A)-(C) is applicable. See 5 U.S.C. § 552a(g)(3)(A) (in camera review only where subsection (k) exemptions are invoked); see also Exner v. FBI, 612 F.2d 1202, 1206 (9th Cir. 1980); Reyes v. Supervisor of DEA, 647 F. Supp. 1509, 1512 (D.P.R. 1986), vacated & remanded on other grounds, 834 F.2d 1093 (1st Cir. 1987). However, this may be a rather academic point in light of the FOIA's grant of in camera review authority under 5 U.S.C. § 552(a)(4)(B). See, e.g., Von Tempske v. HHS, 2 Gov't Disclosure Serv. at 82,385 (rejecting claim that "administrative inquiry" investigative file fell within subsection (j)(2)(B), following in camera review under FOIA).

An important requirement of subsection (j) is that an agency must state in the Federal Register "the reasons why the system of records is to be exempted" from a particular subsection of the Act. 5 U.S.C. § 552a(j) (final sentence); see also 5 U.S.C. § 552a(k) (final sentence). It is unclear whether an agency's stated reasons for exemption--typically, a list of the adverse effects that would occur if the exemption were not available--limit the scope of the exemption when it is applied to specific records in the exempt system in particular cases. See Exner, 612 F.2d at 1206 (framing issue but declining to decide it). As discussed below, a confusing mass of case law in this area illustrates the struggle to give legal effect to this requirement.

Most courts have permitted agencies to claim subsection (j)(2) as a defense in access and/or amendment cases--usually without regard to the specific records at issue or the regulation's stated reasons for the exemption. See, e.g., Castaneda v. Henman, 914 F.2d 981, 986 (7th Cir. 1990) (amendment); Wentz v. Department of Justice, 772 F.2d 335, 337-39 (7th Cir. 1985) (amendment); Fendler, 774 F.2d at 979 (amendment); Shapiro, 721 F.2d at 217-18 (access and amendment); Binion, 695 F.2d at 1192-93 (access); Duffin, 636 F.2d at 711 (access); Exner, 612 F.2d at 1204-07 (access); Ryan v. Department of Justice, 595 F.2d 954, 956-57 (4th Cir. 1979) (access); Anderson v. United States Marshals Serv., 943 F. Supp. 37, 39-40 (D.D.C. 1996) (access); Hatcher, 910 F. Supp. at 2-3 (access); Aquino v. Stone, 768 F. Supp. 529, 530-31 (E.D. Va. 1991) (amendment), aff'd, 957 F.2d 139 (4th Cir. 1992); Whittle v. Moschella, 756 F. Supp. 589, 595-96 (D.D.C. 1991) (access); Simon v. United States Dep't of Justice, 752 F. Supp. 14, 23 (D.D.C. 1990) (access), aff'd, 980 F.2d 782 (D.C. Cir. 1992); Bagley v. FBI, No. C88-4075, slip op. at 2-4 (N.D. Iowa Aug. 28, 1989) (access to accounting of disclosures); Anderson v. Department of Justice, No. 87-5959, slip op. at 1-

2 (E.D. Pa. May 16, 1988) (amendment); Yon v. IRS, 671 F. Supp. 1344, 1347 (S.D. Fla. 1987) (access); Burks v. United States Dep't of Justice, No. 83-CV-189, slip op. at 2 n.1 (N.D.N.Y. Aug. 9, 1985) (access); Stimac v. Department of the Treasury, 586 F. Supp. 34, 35-37 (N.D. Ill. 1984) (access); Cooper v. Department of Justice (FBI), 578 F. Supp. 546, 547 (D.D.C. 1983) (access); Stimac v. FBI, 577 F. Supp. 923, 924-25 (N.D. Ill. 1984) (access); Turner v. Ralston, 567 F. Supp. 606, 607-08 (W.D. Mo. 1983) (access); Smith v. United States Dep't of Justice, No. 81-CV-813, slip op. at 11-15 (N.D.N.Y. Dec. 13, 1983) (amendment); Wilson v. Bell, 3 Gov't Disclosure Serv. (P-H) ¶ 83,025, at 83,471 (S.D. Tex. Nov. 2, 1982) (amendment); Nunez v. DEA, 497 F. Supp. 209, 211 (S.D.N.Y. 1980) (access); Bambulas v. Chief, United States Marshal, No. 77-3229, slip op. at 2 (D. Kan. Jan. 3, 1979) (amendment); Pacheco v. FBI, 470 F. Supp. 1091, 1107 (D.P.R. 1979) (amendment); Varona Pacheco v. FBI, 456 F. Supp. 1024, 1034-35 (D.P.R. 1978) (amendment). But cf. Mittleman v. United States Dep't of the Treasury, 919 F. Supp. 461, 469 (D.D.C. 1995) (finding subsection (k)(2) applicable and citing regulation's stated reasons for exemption of Department of Treasury Inspector General system of records from accounting of disclosures provision pursuant to subsections (j) and (k)(2)), aff'd in part & remanded in part on other grounds, 104 F.3d 410 (D.C. Cir. 1997).

Indeed, the Court of Appeals for the Seventh Circuit has gone so far as to hold that subsection (j)(2) "`does not require that a regulation's rationale for exempting a record from [access] apply in each particular case.'" Wentz, 772 F.2d at 337-38 (quoting Shapiro, 721 F.2d at 218). This appears also to be the view of the Court of Appeals for the First Circuit. See Irons v. Bell, 596 F.2d 468, 471 (1st Cir. 1979) ("None of the additional conditions found in Exemption 7 of the FOIA, such as disclosure of a confidential source, need be met before the Privacy Act exemption applies."); see also Reyes, 647 F. Supp. at 1512 (noting that "justification need not apply to every record and every piece of a record as long as the system is properly exempted" and that "[t]he general exemption applies to the whole system regardless of the content of individual records within it").

In contrast to these cases, a concurring opinion in the decision by the Court of Appeals for the Ninth Circuit in Exner v. FBI articulated a narrower view of subsection (j)(2). See 612 F.2d 1202, 1207-08 (9th Cir. 1980) (construing subsection (j)(2)(B) as "coextensive" with FOIA Exemption 7 and noting that "reason for withholding the document must be consistent with at least one of the adverse effects listed in the [regulation]"). This narrower view of the exemption finds support in two decisions--Powell v. United States Dep't of

Justice, 851 F.2d 394, 395 (D.C. Cir. 1988) (per curiam), and Rosenberg v. Meese, 622 F. Supp. 1451, 1460 (S.D.N.Y. 1985). In Powell, the Court of Appeals for the District of Columbia Circuit ruled that "no legitimate reason" can exist for an agency to refuse to amend a record (in an exempt system of records) already made public with regard only to the requester's correct residence address, and that subsection (j)(2) does not permit an agency to refuse "disclosure or amendment of objective, noncontroversial information" such as race, sex, and correct addresses). 851 F.2d at 395. In Rosenberg, a district court ordered access to a sentencing transcript contained in the same exempt system of records on the ground that the "proffered reasons are simply inapplicable when the particular document requested is a matter of public record." 622 F. Supp. at 1460. The system of records at issue in both Powell and Rosenberg had been exempted from subsection (d), the Act's access and amendment provision. Powell, 851 F.2d at 395; Rosenberg, 622 F. Supp. at 1459-60. However, the agency's regulation failed to specifically state any reason for exempting the system from amendment and its reasons for exempting the system from access were limited. Powell, 851 F.2d at 395; Rosenberg, 622 F. Supp. at 1460. Apparently, because the contents of the particular records at issue were viewed as innocuous--i.e., they had previously been made public--each court found that the agency had lost its exemption (j)(2) claim. Powell, 851 F.2d at 395; Rosenberg, 622 F. Supp. at 1460.

The issue discussed above frequently arises when an agency's regulation exempts its system of records from subsection (g)--the Act's civil remedies provision. Oddly, the language of subsection (j) appears to permit this. See OMB Guidelines, 40 Fed. Reg. 28,948, 28,971 (1975). However, in Tijerina v. Walters, 821 F.2d 789, 795-97 (D.C. Cir. 1987), the D.C. Circuit held that an agency cannot insulate itself from a wrongful disclosure damages action (see 5 U.S.C. § 552a(b), (g)(1)(D)) in such a manner. It construed subsection (j) to permit an agency to exempt only a system of records--and not the agency itself--from other provisions of the Act. See 821 F.2d at 796-97. The result in Tijerina was heavily and understandably influenced by the fact that subsection (j) by its terms does not permit exemption from the subsection (b) restriction-on-disclosure provision. Id.; see also Nakash v. United States Dep't of Justice, 708 F. Supp. 1354, 1358-65 (S.D.N.Y. 1988) (agreeing with Tijerina after extensive discussion of case law and legislative history).

Other courts have indicated that agencies may employ subsection (j)(2) to exempt their systems of records from the subsection (g) civil remedies provision. However, all of these cases suggest that the regulation's statement of reasons for

such exemption itself constitutes a limitation on the scope of the exemption. See Fendler, 846 F.2d at 553-54 & n.3 (declining to dismiss subsection (g)(1)(C) damages action--alleging violation of subsection (e)(5)--on ground that agency's "stated justification for exemption from subsection (g) bears no relation to subsection (e)(5)"); Ryan, 595 F.2d at 957-58 (dismissing access claim, but not wrongful disclosure claim, on ground that record system was exempt from subsection (g) because regulation mentioned only "access" as reason for exemption); Nakash, 708 F. Supp. at 1365 (declining to dismiss wrongful disclosure action for same reason) (alternative holding); Kimberlin v. United States Dep't of Justice, 605 F. Supp. 79, 82 (N.D. Ill. 1985) (same), aff'd, 788 F.2d 434 (7th Cir. 1986); Nutter v. VA, No. 84-2392, slip op. at 2-4 (D.D.C. July 9, 1985) (same); see also Alford, 610 F.2d at 349 (declining to decide whether agency may, by regulation, deprive district courts of jurisdiction to review decisions to deny access).

In contrast to the approach taken in these cases (and in Tijerina), other courts have construed subsection (j)(2) regulations to permit exemption of systems of records from provisions of the Act even where the stated reasons do not appear to be applicable in the particular case. See, e.g., Alexander v. United States, 787 F.2d 1349, 1351-52 & n.2 (9th Cir. 1986) (dismissing subsection (g)(1)(C) damages action--alleging violation of subsection (e)(5)--on ground that system of records was exempt from subsection (g) even though implementing regulation mentioned only "access" as rationale for exemption); Wentz, 772 F.2d at 336-39 (dismissing amendment action on ground that system of records was exempt from subsection (d) even though implementing regulation mentioned only "access" as rationale for exemption and record at issue had been disclosed to plaintiff). Note, however, that the Ninth Circuit's decision in Fendler v. United States Bureau of Prisons significantly narrowed the breadth of its earlier holding in Alexander. See 846 F.2d at 554 n.3 (observing that agency in Alexander "had clearly and expressly exempted its system of records from both subsection (e)(5) and subsection (g) . . . [but that for] some unexplained reason, the Bureau of Prisons, unlike the agency involved in Alexander, did not exempt itself from [subsection] (e)(5)").

Another important issue can arise with regard to the recompilation of information originally compiled for law enforcement purposes into a non-law enforcement record. The D.C. Circuit confronted this issue in Doe v. FBI, 936 F.2d 1346 (D.C. Cir. 1991), in which it applied the principles of a Supreme Court FOIA decision concerning recompilation, FBI v. Abramson, 456 U.S. 615 (1982), to Privacy Act-protected records. It held that "information contained in a document qualifying for subsection (j) or (k) exemption as a law enforce-

ment record does not lose its exempt status when recompiled in a non-law enforcement record if the purposes underlying the exemption of the original document pertain to the recompilation as well." Doe, 936 F.2d at 1356. As was held in Abramson, the D.C. Circuit determined that recompilation does not change the basic "nature" of the information. Id.; accord OMB Guidelines, 40 Fed. Reg. at 28,971 ("The public policy which dictates the need for exempting records . . . is based on the need to protect the contents of the records in the system--not the location of the records. Consequently, in responding to a request for access where documents of another agency are involved, the agency receiving the request should consult the originating agency to determine if the records in question have been exempted.").

C. Seven Specific Exemptions--5 U.S.C. § 552a(k)

"The head of any agency may promulgate rules, in accordance with the requirements (including general notice) of sections 553(b)(1), (2), and (3), (c), and (e) of this title, to exempt any system of records within the agency from subsections (c)(3), (d), (e)(1), (e)(4)(G), (H), and (I) and (f) of this section if the system of records is--

[The seven specific exemptions are discussed in order below.]

At the time rules are adopted under this subsection, the agency shall include in the statement required under section 553(c) of this title, the reasons why the system of records is to be exempted from a provision of this section."

comment -- As noted above, subsection (g)(3)(A) grants courts the authority to review requested records in camera when a subsection (k) exemption is invoked to deny access. Further, several courts have held that reasonable segregation is required under the Act whenever a subsection (k) exemption is invoked. See, e.g., May v. Department of the Air Force, 777 F.2d 1012, 1015-17 (5th Cir. 1985); Lorenz v. NRC, 516 F. Supp. 1151, 1153-55 (D. Colo. 1981); Nemetz v. Department of the Treasury, 446 F. Supp. 102, 105 (N.D. Ill. 1978).

1. 5 U.S.C. § 552a(k)(1)

"subject to the provisions of section 552(b)(1) of this title."

comment -- Subsection (k)(1) simply incorporates FOIA Exemption 1, 5 U.S.C. § 552(b)(1). See Laroque v. United States Dep't of Justice, No. 86-2677, slip op. at 4 (D.D.C. Mar. 16, 1988); Moessmer v. CIA, No. 86-948C(1), slip op. at 3-5 (E.D. Mo. Feb. 19, 1987); Demetracopoulos v. CIA, 3 Gov't Disclosure Serv. (P-H) ¶ 82,508, at 83,279 (D.D.C. Oct. 8, 1982); see also OMB Guidelines, 40 Fed. Reg. 28,948, 28,972 (1975). The exemption has been construed to permit the withholding of classified

records from an agency employee with a security clearance who seeks only private access to records about him. See Martens v. United States Dep't of Commerce, No. 88-3334, slip op. at 7-10 (D.D.C. Aug. 6, 1990).

2. 5 U.S.C. § 552a(k)(2)

"investigatory material compiled for law enforcement purposes, other than material within the scope of subsection (j)(2) of this section: Provided, however, That if any individual is denied any right, privilege, or benefit that he would otherwise be entitled by Federal law, or for which he would otherwise be eligible, as a result of the maintenance of such material, such material shall be provided to such individual, except to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or, prior to the effective date of this section [9-27-75], under an implied promise that the identity of the source would be held in confidence."

comment -- This exemption covers: (1) material compiled for criminal investigative law enforcement purposes, by nonprincipal function criminal law enforcement entities; and (2) material compiled for other investigative law enforcement purposes, by any agency.

The material must be compiled for some investigative "law enforcement" purpose, such as a civil investigation or a criminal investigation by a nonprincipal function criminal law enforcement agency. See, e.g., Shewchun v. INS, No. 95-1920, slip op. at 3, 8-9 (D.D.C. Dec. 10, 1996), summary affirmance granted, No. 97-5044 (D.C. Cir. June 5, 1997); Viotti v. United States Air Force, 902 F. Supp. 1331, 1335 (D. Colo. 1995); Jaindl v. Department of State, No. 90-1489, slip op. at 3 (D.D.C. Jan. 31, 1991), summary affirmance granted, No. 91-5034 (D.C. Cir. Jan. 8, 1992); Barber v. INS, No. 90-0067C, slip op. at 6-9 (W.D. Wash. May 15, 1990); Culver v. IRS, Nos. 85-242, 85-243, slip op. at 1-2 (N.D. Iowa June 5, 1990); Welsh v. IRS, No. 85-1024, slip op. at 2-3 (D.N.M. Oct. 21, 1986); Spence v. IRS, No. 85-1076, slip op. at 2 (D.N.M. Mar. 27, 1986); Jones v. IRS, No. 85-0-736, slip op. at 2-3 (D. Neb. Mar. 3, 1986); Nader v. ICC, No. 82-1037, slip op. at 11 (D.D.C. Nov. 23, 1983); Heinzl v. INS, 3 Gov't Disclosure Serv. (P-H) ¶ 83,121, at 83,725 (N.D. Cal. Dec. 18, 1981); Lobosco v. IRS, No. 77-1464, slip op. at 6-11 (E.D.N.Y. Jan. 14, 1981); Utah Gas & Oil, Inc. v. SEC, 1 Gov't Disclosure Serv. (P-H) ¶ 80,038, at 80,114 (D. Utah Jan. 9, 1980); see also OMB Guidelines, 40 Fed. Reg. 28,948, 28,972-73 (1975).

Therefore, subsection (k)(2) does not include material compiled solely for the purpose of a routine background security investigation of a job applicant. See Vymetalik v. FBI, 785 F.2d 1090, 1093-98 (D.C. Cir. 1986) (noting applicability of narrower subsection (k)(5) to such material and ruling that "specific allegations of illegal activities" must be involved in order for subsection (k)(2) to apply); Bostic v. FBI, No. 1:94 CV 71, slip op. at 7-8 (W.D. Mich. Dec. 16, 1994) (following Vymetalik). However, material compiled for the purpose of investigating agency employees for suspected violations of law can fall within subsection (k)(2). See Strang v. United States Arms Control & Disarmament Agency, 864 F.2d 859, 862-63 n.2 (D.C. Cir. 1989) ("Unlike Vymetalik, this case involves not a job applicant undergoing a routine check of his background and his ability to perform the job, but an existing agency employee investigated for violating national security regulations."); Cohen v. FBI, No. 93-1701, slip op. at 4-6 (D.D.C. Oct. 3, 1995) (applying Vymetalik and finding that particular information within background investigation file qualified as "law enforcement" information "withheld out of a legitimate concern for national security," thus "satisf[ying] the standards set forth in Vymetalik," which recognized that "`[i]f specific allegations of illegal activities were involved, then th[e] investigation might well be characterized as a law enforcement investigation'" and that "`[s]o long as the investigation was "realistically based on a legitimate concern that federal laws have been or may be violated or that national security may be breached" the records may be considered law enforcement records'" (quoting Vymetalik, 785 F.2d at 1098, in turn quoting Pratt v. Webster, 673 F.2d 408, 421 (D.C. Cir. 1982))); see also Viotti, 902 F. Supp. at 1335 (information was "compiled for a law enforcement purpose as stated in 5 U.S.C. § 552a(k)(2)" where "original purpose of the investigation . . . was a complaint to the [Inspector General] of fraud, waste and abuse," even though "complaint was not sustained and no criminal charges were brought," because "plain language of the exemption states that it applies to the purpose of the investigation, not to the result"); Mittleman v. United States Dep't of the Treasury, 919 F. Supp. 461, 469 (D.D.C. 1995) (Inspector General's report "pertain[ing] to plaintiff's grievance against Treasury officials and related matters . . . falls squarely within the reach of exemption (k)(2)"), aff'd in part & remanded in part on other grounds, 104 F.3d 410 (D.C. Cir. 1997); Martens v. United States Dep't of Commerce, No. 88-3334, slip op. at 13-14 (D.D.C. Aug. 6, 1990); Fausto v. Watt, 3 Gov't Disclosure

Serv. (P-H) ¶ 83,217, at 83,929-30 (4th Cir. June 7, 1983); Frank v. United States Dep't of Justice, 480 F. Supp. 596, 597 (D.D.C. 1979).

However, in Doe v. United States Department of Justice, 790 F. Supp. 17, 19-21 (D.D.C. 1992), the District Court for the District of Columbia construed Vymetalik narrowly and determined that although subsection (k)(5) was "directly applicable," subsection (k)(2) also applied to records of an FBI background check on a prospective Department of Justice attorney. It determined that the Department of Justice, as "the nation's primary law enforcement and security agency," id. at 20, had a legitimate law enforcement purpose in ensuring that "officials like Doe . . . be `reliable, trustworthy, of good conduct and character, and of complete and unswerving loyalty to the United States,'" id. (quoting Exec. Order No. 10,450, 18 Fed. Reg. 2489 (Apr. 29, 1953)). It seems to follow that subsection (k)(2) would likewise apply to background investigations of prospective FBI/DEA special agents. See Putnam v. United States Dep't of Justice, 873 F. Supp. 705, 717 (D.D.C. 1995) (finding subsection (k)(2) properly invoked to withhold information that would reveal identities of individuals who provided information in connection with former FBI agent's pre-employment investigation).

More recently, though, the District Court for the District of Columbia, when faced with the same issue concerning subsection (k)(2)/(k)(5) applicability, relied entirely on the D.C. Circuit's opinion in Vymetalik, with no mention whatsoever of Doe v. United States Dep't of Justice. Cohen v. FBI, No. 93-1701 (D.D.C. Oct. 3, 1995). Nevertheless, the D.C. District Court found subsection (k)(2) to be applicable to one document in the background investigation file because that document was "withheld out of a legitimate concern for national security," and "satisfie[d] the standards set forth in Vymetalik," which recognized that "`[i]f specific allegations of illegal activities were involved, then th[e] investigation might well be characterized as a law enforcement investigation'" and that "`[s]o long as the investigation was "realistically based on a legitimate concern that federal laws have been or may be violated or that national security may be breached" the records may be considered law enforcement records.'" Cohen, No. 93-1701, slip op. at 3-6 (D.D.C. Oct. 3, 1995) (quoting Vymetalik, 785 F.2d at 1098, in turn quoting Pratt, 673 F.2d at 421). Another district court rejected Doe and, following the rationale in Vymetalik, held that "`law enforcement purposes' as that term is utilized in [subsection (k)(2) of] the Privacy

Act, does not apply to documents and information gathered during a[n FBI agent applicant's] pre-employment background investigation." Bostic, No. 1:94 CV 71, slip op. at 7-8 (W.D. Mich. Dec. 16, 1994).

Unlike with FOIA Exemption 7(A), 5 U.S.C. § 552(b)(7)(A), there is no temporal limitation on the scope of subsection (k)(2). See Irons v. Bell, 596 F.2d 468, 471 (1st Cir. 1979). But see Anderson v. United States Dep't of the Treasury, No. 76-1404, slip op. at 9-11 (D.D.C. July 19, 1977) (subsection (k)(2) inapplicable to investigatory report regarding alleged wrongdoing by IRS agent where investigation was closed and no possibility of any future law enforcement proceedings existed).

Although the issue has not been the subject of much significant case law, the OMB Guidelines explain that the "Provided, however" provision of subsection (k)(2) means that "[t]o the extent that such an investigatory record is used as a basis for denying an individual any right, privilege, or benefit to which the individual would be entitled in the absence of that record, the individual must be granted access to that record except to the extent that access would reveal the identity of a confidential source." OMB Guidelines, 40 Fed. Reg. at 28,973. The only case that has discussed this provision in any depth is Viotti v. United States Air Force, 902 F. Supp. at 1335-36, in which the District Court for the District of Colorado determined that an Air Force Colonel's forced early retirement "resulted in a loss of a benefit, right or privilege for which he was eligible--the loss of six months to four years of the difference between his active duty pay and retirement pay," and "over his life expectancy . . . the difference in pay between the amount of his retirement pay for twenty-six years of active duty versus thirty years of active duty." Id. The court found that "as a matter of law, based on [a report of inquiry, plaintiff] lost benefits, rights, and privileges for which he was eligible" and thus he was entitled to an unredacted copy of the report "despite the fact that [it] was prepared pursuant to a law enforcement investigation." Id. It went on to find that "the `express' promise requirement" of (k)(2) was not satisfied where a witness "merely expressed a `fear of reprisal.'" Id. (citing Londrigan v. FBI, 670 F.2d 1164, 1170 (D.C. Cir. 1981)).

In Doe v. United States Dep't of Justice, 790 F. Supp. at 21 n.4, 22, the court noted this provision of subsection (k)(2), but determined that it was not applicable because the plain-

tiff "ha[d] no entitlement to a job with the Justice Department." Inexplicably, the court did not discuss whether the denial of a federal job would amount to the denial of a "privilege" or "benefit." See id.; see also Jaindl, No. 90-1489, slip op. at 2 n.1 (D.D.C. Jan. 31, 1991) (noting that "[b]ecause there is no general right to possess a passport," application of (k)(2) was not limited in that case). Another court refused to address the provision's applicability where the plaintiff failed to raise the issue at the administrative level. Comer v. IRS, No. 85-10503-BC, slip op. at 3-5 (E.D. Mich. Mar. 27, 1986), aff'd, 831 F.2d 294 (6th Cir. 1987) (unpublished table decision).

It should be noted that information that originally qualifies for subsection (k)(2) protection should retain that protection even if it subsequently is recompiled into a non-law enforcement record. See Doe v. FBI, 936 F.2d 1346, 1356 (D.C. Cir. 1991) (discussed under subsection (j)(2), above); accord OMB Guidelines, 40 Fed. Reg. at 28,971 (same).

Finally, two courts have considered claims brought by individuals who allegedly provided information pursuant to a promise of confidentiality and sought damages resulting from disclosure of the information and failure to sufficiently protect their identities pursuant to subsection (k)(2). Bechhoefer v. United States Dep't of Justice, 934 F. Supp. 535, 538-39 (W.D.N.Y. 1996); Sterling v. United States, 798 F. Supp. 47, 49 (D.D.C. 1992). In Sterling, the District Court for the District of Columbia stated that the plaintiff was "not barred from stating a claim for monetary damages [under (g)(1)(D)] merely because the record did not contain `personal information' about him and was not retrieved through a search of indices bearing his name or other identifying characteristics," 798 F. Supp. at 49, but in a subsequent opinion the court ultimately ruled in favor of the agency, having been presented with no evidence that the agency had intentionally or willfully disclosed the plaintiff's identity. Sterling v. United States, 826 F. Supp. 570, 571-72 (D.D.C. 1993), summary affirmance granted, No. 93-5264 (D.C. Cir. Mar. 11, 1994). However, the District Court for the Western District of New York in Bechhoefer, when presented with an argument based on Sterling, stated that it did not "find the Sterling court's analysis persuasive." Bechhoefer, 934 F. Supp. at 538-39. Having already determined that the information at issue did not qualify as a record "about" the plaintiff, that court recognized that subsection (k)(2) "does not prohibit agencies from releasing material that would reveal the

identity of a confidential source" but rather "allows agencies to promulgate rules to exempt certain types of documents from mandatory disclosure under other portions of the Act." Id. The court went on to state:

> [P]laintiff's reliance on § 552a(k)(2) is misplaced. It is clear from the statute that restrictions upon disclosure are set forth in § 552a(b) . . . Subsection (k), on the other hand . . . is clearly not intended to prohibit agencies from releasing certain types of information, but simply to allow them to avoid the Act's mandatory-disclosure requirements for such information. Subsection (k), then, is irrelevant to this case.

Id. at 539.

3. 5 U.S.C. § 552a(k)(3)

"maintained in connection with providing protective services to the President of the United States or other individuals pursuant to section 3056 of Title 18."

comment -- This exemption obviously is applicable to certain Secret Service record systems. For a discussion of this exemption, see OMB Guidelines, 40 Fed. Reg. 28,948, 28,973 (1975).

4. 5 U.S.C. § 552a(k)(4)

"required by statute to be maintained and used solely as statistical records."

comment -- For a discussion of this exemption, see OMB Guidelines, 40 Fed. Reg. 28,948, 28,973 (1975).

5. 5 U.S.C. § 552a(k)(5)

"investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for Federal civilian employment, military service, Federal contracts, or access to classified information, but only to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or, prior to the effective date of this section [9-27-75], under an implied promise that the identity of the source would be held in confidence."

comment -- This exemption is generally applicable to source-identifying material in background employment and personnel-type investigative files. See OMB Guidelines, 40 Fed. Reg. 28,948, 28,973-74 (1975); 120 Cong. Rec. 40,406, 40,884-85 (1974), reprinted in Source Book at 860, 996-97. The Court of Appeals for

the District of Columbia Circuit recently held that exemption (k)(5) is also applicable to source-identifying material compiled for determining eligibility for federal grants, stating that "the term `Federal contracts' in Privacy Act exemption (k)(5) encompasses a federal grant agreement if the grant agreement includes the essential elements of a contract and establishes a contractual relationship between the government and the grantee." Henke v. United States Dep't of Commerce, 83 F.3d 1445, 1453 (D.C. Cir. 1996). In situations where "specific allegations of illegal activities" are being investigated, an agency may be able to invoke subsection (k)(2)--which is potentially broader in its coverage than subsection (k)(5). See, e.g., Vymetalik v. FBI, 785 F.2d 1090, 1093-98 (D.C. Cir. 1986).

Subsection (k)(5)--known as the "Erlenborn Amendment"--was among the most hotly debated of any the Act's provisions because it provides for absolute protection to those who qualify as confidential sources, regardless of the adverse effect that the material they provide may have on an individual. See 120 Cong. Rec. 36,655-58 (1974), reprinted in Source Book at 908-19.

That aside, though, subsection (k)(5) is still

a narrow exemption in two respects. First, in contrast to FOIA Exemption 7(D), 5 U.S.C. § 552(b)(7)(D), it requires an express promise of confidentiality for source material acquired after the effective date of the Privacy Act (September 27, 1975). Cf. Viotti v. United States Air Force, 902 F. Supp. 1331, 1336 (D. Colo. 1995) (finding that "`express' promise requirement" of subsection (k)(2) was not satisfied when witness "merely expressed a `fear of reprisal'"). For source material acquired prior to the effective date of the Privacy Act, an implied promise of confidentiality will suffice. See 5 U.S.C. § 552a(k)(5); cf. Londrigan v. FBI, 722 F.2d 840, 844-45 (D.C. Cir. 1983) (no "automatic exemption" for FBI background interviews prior to effective date of Privacy Act; however, inference drawn that interviewees were impliedly promised confidentiality where FBI showed that it had pursued "policy of confidentiality" to which interviewing agents conformed their conduct). See generally United States Dep't of Justice v. Landano, 508 U.S. 165 (1993) (setting standards for demonstrating implied confidentiality under FOIA Exemption 7(D)). Second, in contrast to the second clause of FOIA Exemption 7(D), subsection (k)(5) protects only source-identifying material, not all source-supplied material. Of course, where source-identifying material is exempt from Privacy Act access under subsection (k)(5), it typically is exempt under

the broader exemptions of the FOIA as well. See, e.g., Keenan v. Department of Justice, No. 94-1909, slip op. at 16-17 (D.D.C. Mar. 25, 1997); Bostic v. FBI, No. 1:94 CV 71, slip op. at 8-9, 12-13 (W.D. Mich. Dec. 16, 1994); Miller v. United States, 630 F. Supp. 347, 348-49 (E.D.N.Y. 1986); Patton v. FBI, 626 F. Supp. 445, 446-47 (M.D. Pa. 1985), aff'd, 782 F.2d 1030 (3d Cir. 1986) (unpublished table decision); Diamond v. FBI, 532 F. Supp. 216, 232 (S.D.N.Y. 1981), aff'd, 707 F.2d 75 (2d Cir. 1983). One court has held that subsection (k)(5) protects source-identifying material even where the identity of the source is known. See Volz v. United States Dep't of Justice, 619 F.2d 49, 50 (10th Cir. 1980). Another court has suggested to the contrary. Doe v. United States Civil Serv. Comm'n, 483 F. Supp. 539, 576-77 (S.D.N.Y. 1980) (aberrational decision holding that addresses of three named persons "not exempt from disclosure under (k)(5) . . . because they didn't serve as confidential sources and the plaintiff already knows their identity").

Subsection (k)(5) is not limited to those sources who provide derogatory comments, see Londrigan v. FBI, 670 F.2d 1164, 1170 (D.C. Cir. 1981); see also Voelker v. FBI, 638 F. Supp. 571, 572-73 (E.D. Mo. 1986), and it includes the collection of information for continued as well as original employment, see Hernandez v. Alexander, 671 F.2d 402, 406 (10th Cir. 1982). Also, the exemption's applicability is not diminished by the age of the source-identifying material. See Diamond, 532 F. Supp. at 232-33.

However, an agency cannot rely upon subsection (k)(5) to bar a requester's amendment request, as the exemption applies only to the extent that disclosure of information would reveal the identity of a confidential source. See Vymetalik, 785 F.2d at 1096-98; see also Doe v. FBI, 936 F.2d at 1356 n.12 (although documents at issue were not limited to exemption pursuant to subsection (k)(5), noting that subsection (k)(5) would not apply where FBI refused to amend information that had already been disclosed to individual seeking amendment); Bostic, No. 1:94 CV 71, slip op. at 9 (W.D. Mich. Dec. 16, 1994) (application of exemption (k)(5) in this access case not contrary to, but rather consistent with, Vymetalik and Doe because in those cases exemption (k)(5) did not apply because relief sought was amendment of records).

Note also that OMB's policy guidance indicates that promises of confidentiality are not to be made automatically. 40 Fed. Reg. 28,948, 28,974 (1975). Consistent with the OMB Guidelines, the Office of Personnel Management has promulgated regulations establishing procedures for determining when a pledge of confidentiality is ap-

propriate. See 5 C.F.R. § 736.103-04 (1996); see also Larry v. Lawler, 605 F.2d 954, 961 n.8 (7th Cir. 1978) (suggesting that finding of "good cause" is prerequisite for granting of confidentiality to sources).

Nevertheless, the District Court for the District of Columbia has held that in order to invoke exemption (k)(5) for sources that were in fact promised confidentiality, it is not necessary that the sources themselves affirmatively sought confidentiality, nor must the government make a showing that the sources would not have furnished information without a promise of confidentiality. Henke v. United States Dep't of Commerce, No. 94-0189, 1996 WL 692020, at **9-10 (D.D.C. Aug. 19, 1994). The court went on to state: "[T]he question of whether the reviewers expressed a desire to keep their identities confidential is wholly irrelevant to the Court's determination of whether they were in fact given promises of confidentiality." Id. at *10. On appeal, the Court of Appeals for the District of Columbia Circuit stated that while it "would not go quite that far," as agencies "must use subsection (k)(5) sparingly," agencies may make determinations that promises of confidentiality are necessary "categorically," as "[n]othing in either the statute or the case law requires that [an agency] apply subsection (k)(5) only to those particular reviewers who have expressly asked for an exemption and would otherwise have declined to participate in the peer review process." Henke v. United States Dep't of Commerce, 83 F.3d 1445, 1449 (D.C. Cir. 1996).

Finally, it should be noted that information that originally qualifies for subsection (k)(5) protection should retain that protection even if it subsequently is recompiled into a non-law enforcement record. See Doe v. FBI, 936 F.2d 1346, 1356 (D.C. Cir. 1991) (discussed under subsection (j)(2), above); accord OMB Guidelines, 40 Fed. Reg. at 28,971 (same).

6. 5 U.S.C. § 552a(k)(6)

"testing or examination material used solely to determine individual qualifications for appointment or promotion in the Federal service the disclosure of which would compromise the objectivity or fairness of the testing or examination process."

comment -- It should be noted that material exempt from Privacy Act access under subsection (k)(6) is also typically exempt from FOIA access under FOIA Exemption 2. See Patton v. FBI, 626 F. Supp. 445, 447 (M.D. Pa. 1985), aff'd, 782 F.2d 1030 (3d Cir. 1986) (unpublished table decision); Oatley v. United States, 3 Gov't Disclosure Serv. (P-H) ¶ 83,274, at 84,065-66 (D.D.C. Aug. 16, 1983). For a discussion of

this provision, see OMB Guidelines, 40 Fed. Reg. 28,948, 28,974 (1975).

7. 5 U.S.C. § 552a(k)(7)

"evaluation material used to determine potential for promotion in the armed services, but only to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the government under an express promise that the identity of the source would be held in confidence, or, prior to the effective date of this section [9-25-75], under an implied promise that the identity of the source would be held in confidence."

comment -- For an example of the application of this exemption, see May v. Department of the Air Force, 777 F.2d 1012, 1015-17 (5th Cir. 1985). For a further discussion of this provision, see OMB Guidelines, 40 Fed. Reg. 28,948, 28,974 (1975).

SOCIAL SECURITY NUMBER USAGE

Section 7 of the Privacy Act (found at 5 U.S.C. § 552a note (Disclosure of Social Security Number)) provides that:

"It shall be unlawful for any Federal, State or local government agency to deny to any individual any right, benefit, or privilege provided by law because of such individual's refusal to disclose his social security account number." Sec. 7(a)(1).

comment -- Note that although this provision applies beyond federal agencies, it does not apply to: (1) any disclosure which is required by federal statute; or (2) any disclosure of a social security number to any Federal, State, or local agency maintaining a system of records in existence and operating before January 1, 1975, if such disclosure was required under statute or regulation adopted prior to such date to verify the identity of an individual. See Sec. 7(a)(2)(A)-(B).

Note also that the Tax Reform Act of 1976, 42 U.S.C. § 405(c)(2)(C)(i), (iv) (1994), expressly exempts state agencies from this restriction to the extent that social security numbers are used "in the administration of any tax, general public assistance, driver's license, or motor vehicle registration law within its jurisdiction." See also 42 U.S.C. § 405(c)(2)(C)(ii) (authorizing state use of social security numbers in issuance of birth certificates and for purposes of enforcement of child support orders); 42 U.S.C. § 405(c)(2)(C)(iii) (authorizing use of social security numbers by Secretary of Agriculture in administration of Food Stamp Act of 1977 and by Federal Crop Insurance Corporation in administration of Federal Crop Insurance Act).

"Any Federal, State or local government agency which requests an individual to disclose his social security account number

shall inform that individual whether that disclosure is mandatory or voluntary, by what statutory or other authority such number is solicited, and what uses will be made of it." Sec. 7(b).

comment -- Jurisdiction to enforce the social security number provision might appear questionable inasmuch as the Act does not expressly provide for a civil remedy against a nonfederal agency, or for injunctive relief outside of the access and amendment contexts. However, the courts have recognized implied remedies for violations of its requirements. See Yeager v. Hackensack Water Co., 615 F. Supp. 1087, 1090-92 (D.N.J. 1985); Wolman v. United States, 501 F. Supp. 310, 311 (D.D.C. 1980), remanded, 675 F.2d 1341 (D.C. Cir. 1982) (unpublished table decision), on remand, 542 F. Supp. 84, 85-86 (D.D.C. 1982); Greater Cleveland Welfare Rights Org. v. Bauer, 462 F. Supp. 1313, 1319-21 (N.D. Ohio 1978).

For other decisions construing the provision, see Alcaraz v. Block, 746 F.2d 593, 608-09 (9th Cir. 1984) (Section 7(b)'s notice provision satisfied where agency informed "participants of the voluntariness of the disclosure, the source of authority for it and the possible uses to which the disclosed numbers may be put"); Brookens v. United States, 627 F.2d 494, 496-99 (D.C. Cir. 1980) (agency did not violate Privacy Act because agency maintained system of records "before January 1, 1975 and disclosure of a social security number to identify individuals was required under [executive order]"); McElrath v. Califano, 615 F.2d 434, 440 (7th Cir. 1980) (because disclosure of social security number required by Aid to Families with Dependent Children program under 42 U.S.C. § 602(a)(25) (1994), regulations that give effect to that requirement are not violative of Privacy Act); Green v. Philbrook, 576 F.2d 440, 445-46 (2d Cir. 1978) (same); Johnson v. Fleming, No. 95 Civ. 1891, 1996 WL 502410, at **1, 3-4 (S.D.N.Y. Sept. 4, 1996) (no violation of either section 7(a)(1) or section 7(b) where, during course of seizure of property from plaintiff, an unlicensed streetvendor, plaintiff refused to provide police officer with his social security number and officer "seized all of Plaintiff's records rather than only `a bagful' as other officers allegedly had done" on previous occasions); In re Rausch, No. BK-S-95-23707, 1196 WL 333685, at *7 (Bankr. D. Nev. May 20, 1996) (Privacy Act "inapplicable" because 11 U.S.C. § 110 (1994) "requires placing the SSN upon `documents for filing'"); In re Floyd, 193 B.R. 548, 552-53 (Bankr. N.D. Cal. 1996) (Bankruptcy Code, 11 U.S.C. § 110(c) (1994), required disclosure of social security number, thus section 7(a) inapplicable; further stating that section 7(b) also inapplicable "even assuming the [U.S. Trustee] or the clerk of the bankruptcy court were agencies" because no "request" had been made; rather, because disclosure of social security number is required by statute, "the [U.S. Trustee] is enforcing a Congressional directive, not `requesting' anyone's SSN" and "[t]he

clerk receives documents for filing but does not police their content or form or request that certain information be included"); Krebs v. Rutgers, 797 F. Supp. 1246, 1256 (D.N.J. 1992) (although state-chartered, Rutgers is not state agency or government-controlled corporation subject to Privacy Act); Greidinger v. Davis, 782 F. Supp. 1106, 1108-09 (E.D. Va. 1992) (Privacy Act violated where state did not provide timely notice in accordance with Section 7(b) when collecting social security number for voter registration), rev'd & remanded on other grounds, 988 F.2d 1344 (4th Cir. 1993); Libertarian Party v. Bremer Ehrler, Etc., No. 91-231, slip op. at 17-18 (E.D. Ky. Sept. 30, 1991) (requirement that voter include social security number on signature petition violates Privacy Act); Ingerman v. IRS, No. 89-5396, slip op. at 3-5 (D.N.J. Apr. 3, 1991) (Section 7(b) not applicable to IRS request that taxpayers affix printed mailing label containing social security number on tax returns; no new disclosure occurs because IRS already was in possession of taxpayers' social security numbers), aff'd, 953 F.2d 1380 (3d Cir. 1992) (unpublished table decision); Oakes v. IRS, No. 86-2804, slip op. at 2-3 (D.D.C. Apr. 16, 1987) (Section 7(b) does not require agency requesting individual to disclose his social security number to publish any notice in Federal Register); Doyle v. Wilson, 529 F. Supp. 1343, 1348-50 (D. Del. 1982) (Section 7(b)'s requirements are not fulfilled when no affirmative effort is made to disclose information required under 7(b) "at or before the time the number is requested"); Doe v. Sharp, 491 F. Supp. 346, 347-50 (D. Mass. 1980) (same as Green and McElrath regarding Section 7(a); Section 7(b) creates affirmative duty for agencies to inform applicant of uses to be made of social security numbers--"after-the-fact explanations" not sufficient); and Chambers v. Klein, 419 F. Supp. 569, 580 (D.N.J. 1976) (same as Green, McElrath, and Doe regarding Section 7(a); Section 7(b) not violated where agency failed to notify applicants of use to be made of social security numbers as state had not begun using them pending full implementation of statute requiring their disclosure), aff'd, 564 F.2d 89 (3d Cir. 1977) (unpublished table decision).

GOVERNMENT CONTRACTORS

"When an agency provides by a contract for the operation by or on behalf of the agency of a system of records to accomplish an agency function, the agency shall, consistent with its authority, cause the requirements of this section to be applied to such system. For purposes of subsection (i) of this section any such contractor and any employee of such contractor, if such contract is agreed to on or after the effective date of this section [9-27-75], shall be considered to be an employee of an agency." 5 U.S.C. § 552a(m)(1).

"A consumer reporting agency to which a record is disclosed under section 3711(e) of Title 31 shall not be considered a contractor for the purposes of this section." 5 U.S.C. § 552a(m)(2).

comment -- For guidance concerning this provision, see OMB Guidelines, 40 Fed. Reg. 28,948, 28,951, 28,975-76, (1975), and the legislative debate reported at 120 Cong. Rec. 40,408 (1974), reprinted in Source Book at 866. See generally Boggs v. Southeastern Tidewater Opportunity Project, No. 2:96cv196, U.S. Dist. LEXIS 6977, at *5 (E.D. Va. May 22, 1996) (subsection (m) inapplicable to community action agency that was not "in the business of keeping records for federal agencies").

The Federal Acquisition Regulation sets forth the language that must be inserted in solicitations and contracts "[w]hen the design, development, or operation of a system of records on individuals is required to accomplish an agency function." 48 C.F.R. § 24.104 (1996); see also id. § 52.224-1 to -2.

Also, see the discussion regarding subsection (m) contractors as "employees" for purposes of subsection (b)(1) disclosures under "Conditions Of Disclosure To Third Parties," above.

Even when subsection (m) is applicable, the agency--not the contractor--remains the only proper party defendant in a Privacy Act lawsuit. See Campbell v. VA, 2 Gov't Disclosure Serv. (P-H) ¶ 82,076, at 82,355 (S.D. Iowa Dec. 21, 1981). But cf. Shannon v. General Elec. Co., 812 F. Supp. 308, 311-15 (N.D.N.Y. 1993) (although subsection (m) not mentioned, permitting Privacy Act claims against GE). See generally Adelman v. Discover Card Servs., 915 F. Supp. 1163, 1166 (D. Utah 1996) (with no mention of subsection (m), finding no waiver of sovereign immunity for action brought for alleged violation by state agency working as independent contractor to administer federal program for Social Security Administration, even though procedures and standards governing relationship between SSA and state agency explicitly stated that in event of alleged violation of Privacy Act concerning operation of system of records to accomplish agency function, civil action could be brought against agency).

MAILING LISTS

"An individual's name and address may not be sold or rented by an agency unless such action is specifically authorized by law. This provision shall not be construed to require the withholding of names and addresses otherwise permitted to be made public." 5 U.S.C. § 552a(n).

comment -- For a decision discussing this provision, see Disabled Officer's Ass'n v. Rumsfeld, 428 F. Supp. 454, 459 (D.D.C. 1977), aff'd, 574 F.2d 636 (D.C. Cir. 1978) (unpublished table decision). For a further discussion of this provision, see OMB Guidelines, 40 Fed. Reg. 28,948, 28,976 (1975).

MISCELLANEOUS PROVISIONS

Note that the Privacy Act also contains provisions concerning archival records, see 5 U.S.C. § 552a(l); see also OMB Guidelines, 40 Fed. Reg. 28,948, 28,974-75 (1975), reporting requirements for new record systems, see 5 U.S.C. § 552a(r), and a biennial report to Congress, see 5 U.S.C. § 552a(s).